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IN THE

Supreme Court of the United States

January Term, 1966.

No. 1165

FISHEL RUDAWSKI, LIZA KAHANE, JACOB (RODAN) RUDAWSKI, JACOB TIMIANSKY and ZORAH TIMIANSKY,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioners pray that a Writ of Certiorari issue to review the Order of the Supreme Court of the State of Florida filed June 9, 1965. Petitioners also seek to review a corrected copy filed June 9, 1965, and entered December 1, 1965, upon denial of Petition for Rehearing, December 1, 1965.

OPINIONS BELOW

The opinion of the County Judges' Court In and For Dade County, Florida, and Final Order on Administrator's Petition to Determine Heirs and Beneficiaries and Order

of Escheat was entered July 2, 1962. (Appendix H). It is reported at Probate Record Book 228, Page 633.

The opinion of the Third District Court of Appeal of Florida was filed February 11, 1964. (Appendix F). It is reported at 161 So.2d 40, (Fla. App. 1964).

The opinion of the Supreme Court of Florida was filed on June 9, 1965, (Appendix D); a corrected opinion was entered on December 1, 1965, (Appendix A), upon denial (Appendix B) of a Petition for Rehearing (Appendix C). It is reported at 180 So.2d 161, (1965).

An opinion of the New York Surrogate's Court was entered December 21, 1956, (Appendix J), and is reported at 6 Misc. 2d 47, 159 N. Y. S. 2d 520 (Surr. Ct. 1956).

JURISDICTION

The corrected opinion and Order of the Supreme Court of the State of Florida were entered on December 1, 1965, upon denial of a timely Petition for Rehearing. (Appendix A). Mr. Justice Black extended the time for filing Petition for Writ of Certiorari to and including April 1, 1966. The jurisdiction of this Court is invoked under 28 U. S. Code §1257 (3), because a title, right, privilege or immunity claimed under the Constitution or Statutes of the United States, was denied by the Supreme Court of Florida; and under Rule 19 (a) of the Revised Rules of the Supreme Court of the United States, as amended April 12, 1954, and effective July 1, 1954, because a State Court decided a federal question of substance in a way probably not in accord with applicable decisions of this Court.

QUESTIONS PRESENTED

I.

WHETHER THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE 4, SECTION I, REQUIRES RECOGNITION OF A FOREIGN JUDICIAL DECREE DETERMINING THAT CERTAIN INDIVIDUALS HAVE THE STATUS OF HEIRS IN APPLYING THE ESCHEAT PROVISIONS OF THE FLORIDA STATUTES OF DESCENT AND DISTRIBUTION, F. S. § 731.33, TO THOSE INDIVIDUALS.

II.

WHETHER JUDICIAL APPLICATION OF THE STATUTES OF DESCENT AND DISTRIBUTION PLACING THE BURDEN OF PROOF ON THE PARTY CLAIMING TO BE AN HEIR RATHER THAN ON THE STATE UNCONSTITUTIONALLY APPLIES A VALID ESCHEAT STATUTE IN SUCH MANNER AS TO CAUSE DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.

III.

WHETHER MISCONSTRUCTIONS OF THE OPINIONS OF THE LOWER COURTS RELIED UPON IN ARRIVING AT A DECISION CONSTITUTE ARBITRARY AND CAPRICIOUS JUDICIAL BEHAVIOR DEPRIVING PETITIONERS OF PROPERTY WITHOUT DUE PROCESS OF LAW.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

Constitution of the United States — Article 4, Section 1

> Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Constitution of the United States — Amendment XIV, Section 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 United States Code — § 1257 (3)

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where the validity of a

treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Title 28 Revised Rules of the Supreme Court of the United States Rule 19. Considerations governing review on certiorari

1 (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

Florida Statutes (1963)

§ 731.33 (1) Whenever any person dies leaving property and without being survived by any person entitled to the same, such property shall escheat to the state.

(3) If the county judge determines in such proceeding that there is no person entitled to the property and that the property escheats, said property shall, within a reasonable time to be fixed by the county judge, be sold and converted into money and paid to the treasurer of the state and by him deposited in the state school fund.

(4) Any person claiming to be entitled to the property of the decedent may, at any time within twenty years after the granting of letters, by petition filed with the county judge and service of citation upon the attorney general, re-open the administration and assert his rights. If such claimant is determined to be entitled to any of the property of the decedent, the county judge shall by order fix the amount to which he is entitled, and the same shall be repaid to him without interest by the officials charged with the disbursement of state school funds. If no such claim is asserted in the manner and within the time herein fixed, the title of the state to such property and the proceeds thereof shall become absolute.

STATEMENT OF THE CASE

Jacob Tim died intestate in Miami Beach, Florida, on June 4, 1954. This case originated with a court-approved Stipulation (R. 25, Appendix K) between Administrators to divide the estate consisting of personal property, between the States of New York and Florida, for purposes of administration.

In New York, the Surrogate's Court determined petitioners were heirs, and rejected other claimants. (Appendix J). In Florida, however, the County Judges' Court in and for Dade County, ordered (R 2345, Appendix H) that "no claimant and no person in these proceedings claiming as an heir or beneficiary is entitled to the property . . . " and that the property and estate escheats to the State of Florida in accordance with Section 731.33

Florida Statutes. The New York decree had been admitted into evidence, (R 1653, Ex. # 2) but was rejected by the Florida court, which said the Surrogate had to make certain inferences, assumptions and take judicial notice of factors which "this Court does not believe justified or warranted under the evidence submitted; accordingly, this Court cannot arrive at the same conclusions as the Surrogate of New York." The Florida Court also said that to determine heirship on the basis of the record and evidence presented might do irreparable injustice whereas by escheat any person c l a i m i n g to be entitled to the property might within the permitted time period reopen the administration and assert and prove his rights.

Assignments of Error (R. 2352, Appendix G) were asserted in the Florida District Court of Appeal, Third District, which reversed and remanded the cause "with directions to enter an order in accordance with the views herein expressed." One j u d g e dissented. (Appendix F). The court held that the County Judge erred when he failed to find petitioners had established their status as relations of the deceased; and concluded there was no doubt that Jacob Tim had heirs, that the record would not support a finding of escheat to Florida, and that Florida, as domicile of decedent, was not bound by the law of a sister state in the determination of heirship of personal property. The Court affirmed the County Judge as to the other claimants.

The District Court of Appeal then c e r t i f i e d the matter to the Supreme Court of Florida (Appendix E) under Article V, Section 4 (b) of the Florida Constitution, as a "question of great public interest, because the de-

cision involves a new and important application of the law of escheat".

The Supreme Court of Florida quashed the decision of the District Court of Appeal. It considered the question of proof required before an estate of an intestate decedent may be escheated (Appendix D), and upheld the State's position that the b u r d e n of p r o o f should be upon the claimant asserting a statutory right to inherit; that the presumption of heirs is overcome when the State is unable to find that he left any ascertainable heirs. The Court said petitioners had "failed to carry their burden of showing that they are entitled to the decedent's estate, as his next of kin, and as his *only* next of kin".

Petition for Rehearing (Appendix C) was denied (Appendix B), but a "Corrected Copy" (Appendix A) of the opinion was returned with the denial, and dated back to the original opinion. The corrected copy eliminated the discussion of exclusive heirship, in part, and added that claimants in the proceeding had had their day in Court and their rights adjudicated.

HOW THE FEDERAL QUESTIONS WERE RAISED AND PASSED UPON IN STATE COURTS

The Federal questions here presented were raised as follows:

1. Introduction in evidence (R. 1653, Ex. #2) of the New York Decree in Florida Probate Court. The Court reached an independent conclusion. (Appendix H).

2. In Assignments of Error in the County Judges' Court in and for Dade County, Florida (Appendix G). On Full Faith and Credit: Assignments IV, V, VI, VIII, IX, X, XI. On burden of proof as denial of due process: Assignments II, III, VII, VIII, IX.

The Third District Court of Appeals reversed the County Judges' Court, holding that as against the state certain heirs had proved their relationship to the decedent (Appendix F). The Court said:

> "It is a well-settled principle that escheat is not favored by the law. Any doubt as to whether property is subject to escheat will be resolved against the state... The party claiming must prevail by the strength of his own title not by the weakness of that of his adversary... The ordinary rational as well as the legal presumption as to every person is, that he *must have some relatives and consequently some heirs*, however remote, and whether known to him or not... Jacob Tim has heirs... The record will not support a finding that the property should escheat to the State of Florida...
>
> "... Florida is the proper forum to determine heirship of personal property, and such determination is not bound by the law of a sister state."

The Court held that petitioners had established their status as grandnephews, grandniece, and nephews.

3. The question was certified by the Third District Court of Appeal to the Supreme Court of Florida as a

question of great public interest, because the decision involves a new and important application of the law of escheat. (Appendix E).

The Supreme Court reversed the Third District Court of Appeal. (Appendix D). On the new and critical point dealing with the proof required before the estate of an intestate decedent may be escheated to the State under F. S. 731.33, the Court concluded that the burden of proving the facts upon which the statutory right to inherit depends should be upon the one asserting such right. The Court said that "*there is no presumption that any particular persons are his next of kin, or that his next of kin are ascertainable.* The state's burden is met when, in addition to the proof of the actual death, nonmarriage and intestacy of the propositus, it has been shown that after diligent search and inquiry the state has been unable to find that he left any ascertainable heirs".

The Court said: "We think that there can be no doubt that the Rudawski Group failed to carry their burden of showing that they are entitled to the decedent's estate, as his next of kin, and as his ONLY next of kin."

4. Petition for Rehearing (Appendix C) raised the questions of the apparent misconstruction of the opinions of the courts below; the question of denial of full faith and credit; and the question of burden of proof.

The Petition was denied. (Appendix B).

The Court returned a "Corrected Copy", however, dating its opinion back to the original opinion. (Appendix A). It continued to say that petitioners failed to carry

their burden of showing that they were entitled to the decedent's estate. The Court did *not* say petitioners were not heirs. Nevertheless, in holding that petitioners had failed to carry their burden, the court considered and rejected the decree of the New York Surrogate's Court, as well as the finding of the Court of Appeals. The "Corrected Copy" added that petitioners had had their day in court and their rights adjudicated.

Petitioners' Federal claims were thus made at the earliest opportunity and were renewed at each stage of the proceedings below.

REASONS FOR GRANTING THE WRIT

Escheat is not a tool for the use of the courts to deprive the people of property for the benefit of state coffers; yet under the decision of the Supreme Court of Florida in this cause, the Florida Statutes of Descent and Distribution were thus invalidly used. To reach this result, the Florida Courts violated the Full Faith and Credit and the Due Process Clauses of the United States Constitution. The Florida Supreme Court thereby decided Federal questions of substance in a way probably not in accord with applicable decisions of this Court.

I — FULL FAITH AND CREDIT

The Full Faith and Credit Clause of the Constitution of the United States demands recognition of a foreign judicial decree determining the status of heirs when considering the effect of that status under Florida's Statutes of Descent and Distribution, F. S. 731.33.

Intestate Jacob Tim's large estate of personal property, divided between New York and Florida, by Stipulation, for the purposes of administration, fell within the jurisdiction of each state for the determination of heirs. The New York Surrogate determined petitioners' status as heirs, (Appendix J), but the Florida County Judges' Court reexamined the evidence, and concluded that no claimant had proved status as heir, nor was entitled to the estate, although the New York decree had been properly introduced into evidence. This was a failure to accord full faith and credit to the judgment of a sister state. When the Supreme Court of Florida later found that the State was unable to ascertain heirs but nevertheless had met its burden of proof, implicit in its conclusion were the consideration and rejection of the New York judgment. Thus a substantial federal question was raised, *Huntington v. Attrill, 146 U.S. 657 (1892)*, and decided on the federal ground, and not decided on any independent state ground. *Sherrer v. Sherrer, 334 U.S. 343 (1943)*.

A survey of decisions of this Court reveals the following:

A determination of status is conclusive in a subsequent action, *U.S. v. Moser, 266 U.S. 236 (1924)*.

So necessary is full faith and credit that it must be accorded even though the statute on which the judgment was founded need not be applied in the state of the forum because in conflict with the laws and policy of that state. *Magnolia Petroleum v. Hunt, 320 U.S. 430 (1943); Titus v. Wallick, 306 U.S. 282 (1939)*.

Conclusiveness is necessary to end litigation, *Riley v. New York Trust Co., 315 U. S. 343 (1942)*, to achieve uniformity without deprivation of jurisdiction, *Johnson v. Muelberger, 340 U. S. 581 (1951)* and because there "is no reason to expect the second decision will be more satisfactory than the first". *Stoll v. Gottlieb, 305 U. S. 165 (1938).*

That there is a distinction between the status and the effect given that status under local law as determined by domicile. *Everett v. Everett, 215 U.S. 203, (1909), Sutton v. Leib, 342 U. S. 402 (1952).*

In Everett, the problem was marriage status. The Court there was not concerned with the disposition of local law, but based its judgment entirely on whether or not full faith and credit had been accorded. "The probate court is a court of record . . . And when it has jurisdiction of the parties and subject-matter, its decree, until reversed or modified, is as conclusive in Massachusetts as the judgments of other courts there", the Court said.

Florida itself said in *Gaylord v. Gaylord, 45 So. 2d 507 (1950) at p. 509;*

> "We should not attempt to determine the validity of a decree of a sister state or of a foreign country. More certainly, we should not do so unless something appears on the face of the record which discloses its invalidity."

Furthermore, when jurisdiction of a probate court is asserted over a decedent's estate for the purpose of administration, the proceeding is one in the nature of a proceeding in rem, and is therefore one as to which all the

world is charged with notice. *Goodrich v. Ferris, 214 U.S. 71 (1909); Pitts v. Pitts, 120 Fla. 363, 162 So. 708 (1935).* In a proceeding in rem with respect to a status the judgment is conclusive upon all persons as to the existence of the status. Restatement, *Judgments*, § 74(1) (1942).

The determinative factor is whether the question of status was actually litigated in the cases considered. In this cause, the matter was clearly before the court, and should, therefore, have been conclusively decided.

A matter already determined in the courts of another state is within the collateral estoppel division of res judicata included within the Full Faith and Credit clause, *U. S. v. Silliman, 167 F. 2d, 607 (3d Cir. 1948)*

2. DUE PROCESS AND THE BURDEN OF PROOF IN ESCHEAT

Deprivation of property without due process of law was the result when claimants rather than the State were forced to bear the burden of proof of heirship. The violation occurs when claimants are in effect deprived *prior* to a determination by the court that no heirs exist. That the State will return the property when proof has progressed does not alleviate the initial deprivation, or make it tolerable any more than a presumption of guilt until innocence is shown in criminal matters would be tolerable.

In *Hamilton v. Brown, 161 U.S. 256, (1896)* this Court said that the mere institution of proceedings to determine escheat creates no presumption that there is no one capable of taking the estate under the rules regulating

the descent of estates of deceased persons. "The presumption is to the contrary..."

The right to inherit is statutory, and controlled by the local legislature, but such control must yield to the standards of the United States Constitution, among them due process.

Not only were claimants encumbered with an adverse presumption regarding the burden of proof, so that claimants entered the proceedings already deprived, but the court also encumbered c l a i m a n t s with an intolerable burden of proof in demanding a degree or quantity in excess of that required by due process. It is submitted that such a requirement constitutes an invalid construction of an otherwise valid statute.

For example, the Court held that claimants failed to carry their burden of showing that they were entitled to the estate, but did not say that claimants were not heirs. The District Court of Appeals felt that there was no doubt that heirs existed, and that petitioners were heirs, but that the difficulty lay in determining whether they were exclusive heirs. Since the persons entitled to the estate are those who are heirs, a determination that no heirs exist would logically be necessary before the estate could escheat. "Where the escheat is for defect of heirs, an inquisition which fails to find that the decedent died intestate and without heirs and that he died seized of the property in question is a nullity". *19* Am. Jur. *Escheat* § 43, (1939), P. 409.

Reasons exist for the failure of the court to say there were no heirs. First, the presumption is "that there is

somewhere some one next of kin to every decedent". (Appendix A). Second, the New York judgment, even if not given full effect in Florida, indicated that at least in New York heirs were in existence.

The Court also stated "the mere fact of a blood relationship with the deceased does not of itself, establish a right to share in his estate. Cf. Stone v. Citizens State Bank, 1912, 64 Fla. 456, 59 So. 945" (Appendix A). It is submitted, however, that the meaning behind this statement is merely that the right of inheritance under the statutes is not absolutely limited to blood relations. The surviving spouse of the intestate is put on the same level as a child of the intestate, and even from territorial days relatives by affinity have been allowed to take to prevent escheat. 10 Fla. Jur. *Descent and Distribution*, § 45 (1956) at p. 278. Blood relationship alone is not a sufficient basis to establish a right to inherit if others have a *prior* right under the statute. The statutes usually place emphasis upon kinship as established by the blood stream. In re: *Hewett's Estate, 153 Fla. 137, 13 So. 2d 904 (1943).*

Thus, in the absence of a determination that there were no heirs, the record does not support the finding that no one is entitled to the property. The probate court, whose decision the Supreme Court of Florida affirmed, commented that to determine heirship would be an injustice and therefore escheat would be the preferable act, since rights could later be proved. Can deprivation without due process ever be the preferable act?

The quantity and quality of proof required offend the Constitution of the United States. The matter is particularly urgent since this was a case of first impression on

the subject, and certified by the District Court of Appeal as a question of great public interest.

3. DUE PROCESS AND JUDICIAL MISCONSTRUCTION

It seems clear that a violation of the due process clause may be committed by the state judiciary at least in construing a state statute.

American Ry. Express Co. v. Commonwealth of Kentucky, 273 U.S. 269 (1927) said the Federal Court interferes only if the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. *Roberts v. City of New York, 295 U. S. 264 (1935)*. Prohibition against deprivation of property was intended to secure the individual from arbitrary exercise of powers of government. *Scott v. McNeal, 154 U.S. 34 (1894)*

> "The violation (of 14 Amendment) is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid state statute. The federal guaranty of due process extends to state action through the judicial as well as through its legislative, executive, or administrative branch of government. (citations omitted)." *Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673 (1930).*

The Florida court violated due process by arbitrary and capricious misconstructions of opinions of lower courts.

1. The Probate Court concluded that no claimant had shown a relationship with the decedent, and that to determine heirship on the basis of the record and evidence presented might do irreparable injustice, whereas by escheat any person claiming to be entitled might at any time within the permitted period assert and prove his rights. The holding of the Supreme Court of Florida that as to claimants the day in court is past, is irreconcilable, and arbitrary. Courts have no power to amend or suspend laws; such function exists in the legislature. The judiciary has no veto power and must effectuate the policy of the law as expressed in valid statutes. 6 Fla. Jur. *Constitutional Law*, § 137 (1956) p. 384. The Supreme Court has no authority to change the law simply because it appears to it to be inadequate in a particular case. *State of Florida v. County of Manatee, 93 So.2d 381 (1957).*

In *Gorny v. Trustees of Milwaukee County Orphans Board, 93 F.2d 107, (7th Cir 1937)*, in discussing a statute ordering a refund under escheat the court said that a state court could not make a finding of "no heirs" where the statute contemplated that any heir might establish a right to the fund by complying with the conditions therein contained.

2. The original opinion of the Supreme Court (Appendix D) noted,

> "The cause was remanded to the County Judge 'with directions to enter an order in accordance with the views herein expressed' — presumably

to order distribution of the entire Florida estate to the five persons comprising the R u d a w s k i Group."

However, the District Court of Appeal had noted,

"We cannot say that the evidence supporting the claims of the appellants (Rudawski Group) is exclusive of other heirs . . ."

The Supreme Court then went on to say it could not understand the propriety of distributing the estate to the exclusion of other persons in the same class. However, distribution had not been ordered. A later correction of the opinion eliminated some discussion of exclusive heirship, but did not erase the misconception which was the basis for the opinion.

3. The judiciary acted in an arbitrary and capricious manner when it failed to accord the necessary full faith and credit to the New York judgment, as well as by placing an intolerable burden on claimants when the legislative policy defers escheat when possible, and by announcing that heirs are determined by something other than a blood relationship.

4. The procedure of the Court in denying a Petition for Rehearing, and then correcting its opinion in a cursory manner retroactively, is additional caprice.

CONCLUSION

For the reasons stated, the granting of the Writ is urged. The decision of the Court below should be reversed because it has decided a case of first impression in a manner which is incompatible with the United States Constitution and applicable decisions of this Court. Full faith and credit and due process are well established principles and judicial safeguards to combat, balance, and curb an overly acquisitive local government.

Respectfully submitted

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APPENDIX A

CORRECTED COPY

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1965
CASE NO. 33,393

and

CASE NO. 33,413

In re ESTATE OF JACOB TIM,

Deceased.

STATE OF FLORIDA,

Petitioner,

vs.

FISHEL RUDAWSKI, LIZA KAHANE, JACOB (RODEN) RUDAWSKI, JACOB TIMIANSKY and ZORAH TIMIANSKY,

Respondents.

Opinion filed June 9, 1965

Writs of Certiorari to the District Court of Appeal, Third District

Earl Faircloth, Attorney General, and Joseph Nesbitt, Assistant Attorney General, for Petitioner

Milton E. Grusmark, Max Silver and Sibley, King &

Levenson, for Fishel Rudawski, Liza Kahane, Jacob (Roden) Rudawski, Jacob Timiansky and Zorah Timiansky, Respondents

Thomas H. Wakefield, as Guardian Ad Litem for the unknown heirs of Jacob Tim, deceased

PER CURIAM.

The decision here reviewed, In re Estate of Jacob Tim, Fla. App. 1964, 161 So. 2d 40, has been certified to this court by the District Court of Appeal, Third District, as one which "passes upon a question * * * of great public interest." We have jurisdiction under Section 4(2), Article V, Florida Constitution. See Susco Car Rental System of Florida v. Leonard, Fla. 1959, 112 So. 2d 832.

The history of the litigation and factual background are set forth in considerable detail in the decision of the appellate court, supra, 161 So. 2d 40. For our purposes, all that is necessary is a brief summary.

The decedent, Jacob Tim, died intestate in Miami Beach, Florida, in 1954. In 1956 the administrator of his estate filed in the County Judge's Court of Dade County a petition for the determination of heirship of the decedent's estate, as authorized by Section 734.25, Florida Statutes. In response to the publication of citation some fifty-three persons, claiming to be nephews, nieces, grandnephews, grand-nieces and cousins of varying degrees to the decedent, appeared to litigate their respective claims. In 1960 the State of Florida, through its Attorney General, filed in the proceedings a Claim of Escheat under the provisions of Sec. 731.33, Florida Statutes.

The County Judge, after considering voluminous testimony in the form of depositions and hearing the testimony of other witnesses, entered his Order finding that "no claimant and no person in these proceedings claiming as an heir or beneficiary is entitled to the property and estate of the decedent" and ordering that the said estate be escheated to the State of Florida in accordance with Sec. 731.33, Florida Statutes.

On appeal, the District Court of Appeal, Third District, reversed, the basis of its decision being that the County Judge erred in failing to find that one group of five claimants (the so-called Rudawski Group) had established their "status" as nephews, grand-nephews and grand-niece, respectively, of Jacob Tim. The finding of the County Judge as to the remaining claimants was affirmed, although the appellate court noted in its opinion that

> "We cannot say that the evidence supporting the claims of the appellants (Rudawski Group) is the exclusive of other heirs, but none of the other claimants have met the degree of proof required."

The cause was remanded to the County Judge "with directions to enter an order in accordance with the views herein expressed." — presumably to order distribution of the entire Florida estate to the five persons comprising the Rudawski Group.

The critical point to be resolved here — and one which has not heretofore been decided by this court — has to do with the proof required before the estate of a dece-

dent may be escheated to the State under Sec. 731.33, supra. The respondents (the so-called Rudawski Group, who were successful on the appeal from the County Judge's order) contend that in escheat proceedings "the burden is upon the State to prove that heirs do not exist" and that the escheat statute "is liberally construed in favor of the existence of heirs and against the State of Florida." The State contends, on the other hand, that its duty is performed when it shows that, after diligent search and inquiry, no person or persons "entitled to the property" can be found, and that, thereafter, the burden is upon the claimants to prove their particular relationship to the decedent as the next of kin who are entitled, under the statute of decedent and distribution, to his estate. We have concluded that the State's contention is supported by both reason and authority.

Sec. 731.33(1) reads as follows:

> "(1) Whenever any person dies leaving property and without being survived by any person entitled to the same, such property shall escheat to the state."

The mere fact of a blood relationship with the deceased does not of itself, establish a right to share in his estate. Cf. Stone v. Citizens State Bank, 1912, 64 Fla. 456, 59 So. 945. Our Statute of Descent and Distribution, Sec. 731.23, Florida Statutes establishes the order of succession of an intestate's property in this state; and to be "entitled" to inherit a share of the state there must be no other persons of a class having a prior right, under the established order of succession, to such estate. See 10 Fla. Jur., Descent and Distribution, Sec. 40. The bur-

den of proving the existence of the state of facts upon which the statutory right to inherit depends should be upon the one asserting such statutory right. See 20 Am. Jur., Evidence, Sec. 135, p. 140. It was so held in In re Miller's Estate, 87 Wash. 69, 151 Pac. 105. The court there said, and we agree:

> "It is true that the burden in the first instance rests upon the state to overcome by competent evidence the presumption that the decedent left heirs capable of inheritance. But this presumption is not so broad, nor the burden so onerous as counsel seems to assume. While there is a presumption that there is somewhere some one next of kin to every decedent, **there is no presumption that any particular persons are his next of kin, or that his next of kin are ascertainable.** The state's burden is met when, in addition to proof of the actual death, nonmarriage, and intestacy of the propositus, it has been shown that after diligent search and inquiry the state has been unable to find that he left any ascertainable heirs. Any other rule would render an escheat impossible by making the presumption that there are next of kin to every intent an irrefragable presumption. When the state has shown these things it has established prima facie the escheat of the property. The burden is then upon a particular claimant to prove by the ordinary rules and competent evidence that he is in fact the next of kin. This is not shifting the burden of proof, but is a mere progress of proof directed to an independent issue, the affirmative of which is in the nature of the case at all times upon the

claimant of the property. He must prove his title." (Emphasis added.)

See also State v. Grooms, 133 P. 2d 379, and People v. Fulton Fire Ins. Co., 25 Wend. (N. Y.) 205, 216.

We think that there can be no doubt that all claimants, including the Rudawski Group, failed to carry their burden of showing that they, or any of them, are entitled to the decedent's estate. Further, we feel and so hold that all the claimants appearing in this probate proceeding have had their day in court and their rights have been adjudicated. See F. S. 731.33. Accordingly, the decision of the appellate court reversing the order of the County Judge, who based his findings and conclusions upon substantial competent evidence, cannot stand.

For the reasons stated, the decision here reviewed is quashed, and the cause remanded with directions to affirm the decision of the Probate Court.

It is so ordered.

DREW, C. J., ROBERTS, THORNAL, O'CONNELL and CALDWELL, JJ., concur THOMAS, J., heard the argument but did not participate in the decision

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

JULY TERM A.D. 1965

WEDNESDAY, DEC. 1, 1965

[CAPTION OMITTED]

ORDER

On consideration of the Petition for Rehearing and Request for Oral Argument on the Petition for Rehearing filed by Attorneys for Respondents,

IT IS ORDERED by the Court that said petition and request for oral argument be, and the same are hereby, denied.

A TRUE COPY,
TEST:
SID J. WHITE
CLERK SUPREME COURT
(THE MANDATE IN THE ABOVE CASES HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT)
CC:
Hon. Milton E. Grusmark
Messrs. Sibley & Levenson
Hon. Earl Faircloth
Hon. Joseph Nesbitt
Hon. Thomas H. Wakefield
Hon. W. P. Carter

APPENDIX C

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1965

[CAPTION OMITTED]

PETITION FOR REHEARING

COME NOW the Respondents, FISHEL RUDAWSKI, LIZA KAHANE, JACOB (RODEN) RUDAWSKI, JACOB TIMIANSKY and ZORAH TIMIANSKY, by their undersigned Attorneys and file this, their Petition for Rehearing of the Court's Opinion of June 9, 1965, entered in the above entitled cases. (These Respondents, who are nationals of the State of Israel, are sometimes referred to in the record as the "Israeli Group" and sometimes as the "Rudawski Group").

For the purpose of this Petition the following designations will be employed:

(a) The Opinion of the Supreme Court of Florida of June 9, 1965, will be referred to as "This Court's Opinion".

(b) The Opinion of the District Court of Appeal, Third District, dated February 11, 1964, and reported in Fla. 161 So.2d 40, will be referred to as "Appellate Court's Opinion".

(c) The Order of the Probate Court will be referred to as "Probate Court's Order".

This Petition for Rehearing is based upon the following grounds:

I.

It is respectfully submitted that this Court's Opinion is in conflict with the Probate Court Order, notwithstanding the fact that that Order has been reinstated. It is also apparent by analysis that this Court's Opinion is in basic agreement with the Appellate Court's Opinion and yet the latter has been quashed. The disagreement with the Appellate Court's Opinion is founded upon this Court's interpretation of the language "The cause (is) remanded with directions to enter an order in accordance with the views herein expressed".

II.

The Probate Court's Order declared the escheat of Jacob Tim's estate to the State of Florida. In so doing it bottomed its directive upon the finding that no claimant (including these Respondents) had established relationship with the decedent.

The County Judge said:

> "It is the conclusion of this Court after due consideration of the record in these proceedings that no claimant herein has shown by sufficient and credible evidence a relationship with the decedent through a common ancestor. . , ".

The District Court of Appeal, Third District, stated:

"We, therefore, hold that the county judge erred when he failed to find that Fishel Rudawski, Jacob (Roden) Rudawski and Liza Kahane had established their status as grandnephews and grandniece, respectively, of Jacob Tim the deceased. Further, we hold that Jacob Timiansky and Zorah Timiansky established their status as nephews of the deceased. . . . We cannot say that the evidence supporting the claims of the appellants (Rudawski Group) is exclusive of other heirs, . . . ". See *In Re Tim's Estate*, Fla. 161 So. 2d 40, at page 45.

This Court stated:

"The mere fact of a blood relationship with the deceased does not, of itself, establish a right to share in his estate. . . As noted above, the appellate court in its opinion in support of the decision here reviewed noted that it could not say that the claim of the Rudawski Group 'is exclusive of other heirs'. This being so, we are at a loss to under stand the propriety of distributing the decedent's estate to this group, to the exclusion of other persons of the same class who would be similarly entitled to share in the estate. We think that there can be no doubt that the Rudawski Group failed to carry their burden of showing that they are entitled to the decedent's estate, as his next of kin, and as his *only* next of kin".

Thus, the Probate Court's finding directly conflicts

with the import of this Court's Opinion in that Respondents would not be permitted to go forward with the progress of proof to show that they are the exclusive kin or the next of kin of the decedent. Yet the clear effect of this Court's Opinion is to permit Respondents to show by further evidence that "(they are) in fact the next of kin" and thus that they are entitled to inherit the estate under the Statute of descent and distribution.

Reaffirming the Probate Court's Order would not permit the carrying on of that progress of proof referred to in this Court's Opinion to show exclusivity of kinship, if such be the fact, since the Probate Court's Order rejected the proof accepted by the Appellate Court and this Court establishing relationship of Respondents with the decedent.

This Court's Opinion affirmed the right of these Respondents as persons falling within the purview of Florida Statute 731.33(4) to assert rights to the estate or a porion thereof in subsequent proceedings contemplated by the statute and this Court's Opinion. The Probate Court's Order effectively holds that these Respondents are not such persons as may be entitled to go forward with the progress of proof in such subsequent proceedings.

III.

This Court overlooked and failed to consider the fact that its Opinion is consistent with the Appellate Court's Opinion other than its determination that the Appellate Court erred in apparently ordering distribution of the decedent's estate to these Respondents to the exclusion of

other persons of the same class who would be similarly entitled to share in the estate.

This is a case of first impression in this State. This Court has enunciated the rules of procedure in proceedings relating to escheat under the Florida Statutes. The apparent disagreement with the Appellate Court's Opinion is in the interpretation by this Court of what it considers would be an order entered on the mandate following the Appellate Court's Opinion. Yet the Appellate Court's Opinion would be totally consistent with the Opinion entered by this Court on June 9, 1965, if the Order on the mandate provided that further evidence should be taken to show the particular relationship of these Respondents with the decedent and to show whether or not there are other persons of a class having a prior right under the established order of succession to decedent's estate.

This Court overlooked and failed to consider the fact that in the Appellate Court's Opinion it is clearly implicit that the Order which it directed the County Judge to enter would simply find that the Rudawski Group were heirs of the decedent but that distribution must be postponed until such time as these claimants could prove the existence or non-existence of heirs having prior rights under the statute of descent and distribution.

That type of Order on the mandate would be consistent with the Appellate Court's Opinion holding that Respondents had not yet shown their rights as exclusive heirs.

The appropriateness of such an Order on the mandate in these proceedings is supported by the Opinion reported at In Re Tim's Estate, 6 Misc. 2d 47, 159 N.Y.S. 2d 520

(Surr.Ct.1956), affirmed without opinion at 8 App. Div. 2d, 720, 187 N.Y.S. 2d 1019 (1959).

As reflected by the proceedings and Opinions relating to this case, similar hearings were held in New York regarding the rights of these Respondents and other claimants to a portion of the estate then being administered in New York. In those proceedings, Surrogate Collins found:

> "From all of the evidence and the reasonable inferences to be drawn therefrom, the court concludes that the objectants, Fishel Rudawski, Jacob Roden and Liza Kahane have established their status as grandnephews and grandniece, respectively, of the decedent, and that the objectants Jacob and Zorah Timiansky have established their status as nephews of the decedent".

The District Court of Appeal, Third District, stated:

> "We, therefore, hold that the county judge erred when he failed to find that Fishel Rudawski, Jacob (Roden) Rudawski and Liza Kahane had established their status as grandnephews and grandniece, respectively, of Jacob Tim the deceased. Further, we hold that Jacob Timiansky and Zorah Timiansky established their status as nephews of the deceased". See *In Re Tim's Estate*, Fla. 161 So.2d 40, at page 45.

Surrogate Collins then held in New York:

> "Further proof will be necessary to determine whether they are the sole distributees".

The District Court of Appeal, Third District, stated in these proceedings:

> "We cannot say that the evidence supporting the claims of the appellants (Rudawski Group) is exclusive of other heirs. . . ".

IV.

In rejecting the contention of these Respondents that their status as heirs of the decedent in New York was binding under the full faith and credit clause of the Constitution of the United States on the Probate Court, the independent determination by the Appellate Court that such relationship existed made it unnecessary for Respondents to pursue that position.

The Court overlooked and failed to consider that its opinion of June 9, 1965, reaffirming the Probate Court order, permits that Court to violate these Respondents' rights under the full faith and credit provisions of the Constitution of the United States.

V.

Respondents urge that that portion of this Court's opinion which holds that the Appellate Court apparently ordered distribution of the estate to these Respondents extends the effect of the Appellate Court's opinion beyond its necessary implication. The Appellate Court's opinion would be completely consistent with this Court's opinion if the order of reversal directed the Probate Court to continue these proceedings in a manner consistent with the directives laid out by this Court.

CONCLUSION

This proceeding was certified to this Court as a matter of great public interest by the Appellate Court.

This Court speaks for the first time concerning the progress of proof in escheat proceedings.

The Probate Court must follow the delineation of that procedure but without destruction of such rights as these claimants may have in accordance with the proof thus far presented.

It is urged that the opinion of June 9, 1965, should be reconsidered and that upon such reconsideration the Appellate Court's opinion should be affirmed with directions requiring the further progress of this case to be conducted in accordance with the procedure enunciated by this Honorable Court.

Respectfully submitted,

Milton E. Grusmark,
Max Silver, and
Sibley and Levenson,
Attorneys for Respondents
407 Lincoln Road
Miami Beach, Florida

By_____
Milton E. Grusmark

I HEREBY CERTIFY that a true copy of the foregoing was mailed to EARL FAIRCLOTH, Esq., Attorney General, and JOSEPH NESBITT, Assistant Attorney General, Attorneys for Petitioner, Tallahassee, Florida; and THOMAS H. WAKEFIELD, Esq., Attorney for Guardian Ad Litem for Unknown Heirs, 150 S. E. 2nd Street, Miami, Florida, this 23 day of June, 1965.

Milton E. Grusmark

APPENDIX D

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A.D. 1965

[CAPTION OMITTED]

OPINION

Opinion filed June 9, 1965

Writs of Certiorari to the District Court of Appeal, Third District

Earl Faircloth, Attorney General, and Joseph Nesbitt, Assistant Attorney General, for Petitioner

Milton E. Grusmark, Max Silver and Sibley, King & Levenson, for Fishel Rudawski, Liza Kahane (Roden) Rudawski, Jacob Timiansky and Zorah Timiansky, Respondents

Thomas H. Wakefield, as Guardian Ad Litem for the unknown heirs of Jacob Tim, deceased

PER CURIAM.

The decision here reviewed, In re Estate of Jacob Tim, Fla. App. 1964, 161 So. 2d 40, has been certified to this court by the District Court of Appeal, Third District, as one which "passes upon a question * * * of great public interest." We have jurisdiction under Section 4(2), Article V, Florida Constitution. See Susco Car Rental

System of Florida v. Leonard, Fla. 1959, 112 So. 2d 832.

The history of the litigation and factual background are set forth in considerable detail in the decision of the appellate court, supra, 161 So. 2d 40. For our purposes, all that is necessary is a brief summary.

The decedent, Jacob Tim, died intestate in Miami Beach, Florida, in 1954. In 1956 the administrator of his estate filed in the County Judge's Court of Dade County a petition for the determination of heirship of the decedent's estate, as authorized by Section 734.25, Florida Statutes. In response to the publication of citation some fifty-three persons, claiming to be nephews, nieces, grand-nephews, grand-nieces and cousins of varying degrees to the decedent, appeared to litigate their respective claims. In 1960 the State of Florida, through its Attorney General, filed in the proceedings a Claim of Escheat under the provisions of Sec. 731.33, Florida Statutes.

The County Judge, after considering voluminous testimony in the form of depositions and hearing the testimony of other witnesses, entered his Order finding that "no claimant and no person in these proceedings claiming as an heir or beneficiary is entitled to the property and estate of the decedent" and ordering that the said estate be escheated to the State of Florida in accordance with Sec. 731.33, Florida Statutes.

On appeal, the District Court of Appeal, Third District, reversed, the basis of its decision being that the County Judge erred in failing to find that one group of five claimants (the so-called Rudawski Group) had established their "status" as nephews, grand-nephews and

grand-niece, respectively, of Jacob Tim. The finding of the County Judge as to the remaining claimants was affirmed, although the appellate court noted in its opinion that

> "We cannot say that the evidence supporting the claims of the appellants (Rudawski Group) is the exclusive of other heirs, but none of the other claimants have met the degree of proof required."

The cause was remanded to the County Judge "with directions to enter an order in accordance with the views herein expressed." — presumably to order distribution of the entire Florida estate to the five persons comprising the Rudawski Group.

The critical point to be resolved here — and one which has not heretofore been decided by this court — has to do with the proof required before the estate of a decedent may be escheated to the State under Sec. 731.33, supra. The respondents (the so-called Rudawski Group, who were successful on the appeal from the County Judge's order) contend that in escheat proceedings "the burden is upon the State to prove that heirs do not exist" and that the escheat statute "is liberally construed in favor of the existence of heirs and against the State of Florida." The State contends, on the other hand, that its duty is performed when it shows that, after diligent search and inquiry, no person or persons "entitled to the property" can be found, and that, thereafter, the burden is upon the claimants to prove their particular relationship to the decedent as the next of kin who are entitled, under the statute of descent and distribution,

to his estate. We have concluded that the State's contention is supported by both reason and authority.

Sec. 731.33(1) reads as follows:

> "(1) Whenever any person dies leaving property and without being survived by any person entitled to the same, such property shall escheat to the state."

The mere fact of a blood relationship with the deceased does not, of itself, establish a right to share in his estate. Cf. Stone v. Citizens State Bank, 1912, 64 Fla. 456, 59 So. 945. Our Statute of Descent and Distribution, Sec. 731.23, Florida Statutes establishes the order of succession of an intestate's property in this state; and to be "entitled" to inherit a share of the estate there must be no other persons of a class having a prior right, under the established order of succession, to such estate. See 10 Fla. Jur., Descent and Distribution, Sec. 40. The burden of proving the existence of the state of facts upon which the statutory right to inherit depends should be upon the one asserting such statutory right. See 20 Am. Jur., Evidence, Sec. 135, p. 140. It was so held in In re Miller's Estate, 87 Wash. 69, 151 Pac. 105. The court there said, and we agree:

> "It is true that the burden in the first instance rests upon the state to overcome by competent evidence the presumption that the decedent left heirs capable of inheritance. But this presumption is not so broad, nor the burden so onerous as counsel seems to assume. While there is a presumption that there is somewhere some one

> next of kin to every decedent, **there is no presumption that any particular persons are his next of kin, or that his next of kin are ascertainable.** The state's burden is met when, in addition to proof of the actual death, nonmarriage, and intestacy of the propositus, it has been shown that after diligent search and inquiry the state has been unable to find that he left any ascertainable heirs. Any other rule would render an escheat impossible by making the presumption that there are next of kin to every intent an irrefragable presumption. When the state has shown these things it has established prima facie the escheat of the property. The burden is then upon a particular claimant to prove by the ordinary rules and competent evidence that he is in fact the next of kin. This is not shifting the burden of proof, but is a mere progress of proof directed to an independent issue, the affirmative of which is in the nature of the case at all times upon the claimant of the property. He must prove his title." (Emphasis added.)

See also State v. Grooms, 133 P. 2d 379, and People v. Fulton Fire Ins. Co., 25 Wend. (N. Y.) 205, 216.

As noted above, the appellate court in its opinion in support of the decision here reviewed noted that it could not say that the claim of the Rudawski Group "is exclusive of other heirs." This being so, we are at a loss to understand the propriety of distributing the decedent's estate to this group, to the exclusion of other persons of the same class who would be similarly entitled to share in the estate. We think that there can be no doubt that

the Rudawski Group failed to carry their burden of showing that they are entitled to the decedent's estate, as his next of kin, and as his **only** next of kin. Accordingly, the decision of the appellate court apparently so holding and reversing the order of the County Judge cannot stand.

For the reasons stated, the decision here reviewed is quashed, and the cause remanded with directions to affirm the decision of the Probate Court.

It is so ordered.

DREW, C. J., ROBERTS, THORNAL, O'CONNELL and CALDWELL, JJ., concur THOMAS, J., heard the argument but did not participate in the decision

APPENDIX E

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA—THIRD DISTRICT

JANUARY TERM, A.D. 1964

[CAPTION OMITTED]

CASE NO. 62-559

To the Honorable, the Supreme Court of Florida:

We hereby certify to the Supreme Court of Florida, under and as provided for in Article V, Section 4(b) of the Constitution of Florida, as a means of bringing this cause within the jurisdiction of the Supreme Court in the event certiorari is applied for; that the decision of this court in this cause "passes upon a question * * * of great public interest", because the decision involves a new and important application of the law of escheat.

Respectfully submitted,

/s/ MALLORY H. HORTON Judge

/s/ TILLMAN PEARSON Judge

/s/ NORMAN HENDRY Judge

A True Copy

ATTEST:

WILLIAM P. CARTER
Clerk District Court of
Appeal, Third District

Note to Counsel:

This certificate is not self-executing and the provisions of Rule 4.5(c)(6), Florida Appellate Rules, apply in the event certiorari under the court's certification is desired.

APPENDIX F

IN THE DISTRICT COURT OF APPEAL OF FLORIDA—THIRD DISTRICT

JANUARY TERM, A.D. 1964

[CAPTION OMITTED]

CASE NO. 62-559

Opinion filed February 11, 1964.

An Appeal from the County Judges' Court for Dade County, W. F. Blanton, Judge.

Sibley, Grusmark, Giblin, King & Levenson; Max Silver, for appellants Fishel Rudawski, Jacob Timiansky and Zorah Timiansky.

Richard K. Fink, for appellants Sophie Kovner, Sarah Bernard, Anna Wachtel, Rose Hechler, Becky Fine and Mary Bernard.

Harold B. Spaet; Meyer Poses (New York), for appellees Vera Poses, Anna Derman, Anna Gaba Goldberg, Harriet Frank, Ray Konigsberg, Fannie Smith, David Goldstein and Louis Goldstein.

Harold Tannen for appellees Sofia Abramovna Gringauz, Maria Abramovna Gudim, Elizaveta Abramovna Tymianskaya, Yakov Abramovich Tymiansky, Meer Rakhmilevich Tymiansky, Movsha Rakhmilevich Tymiansky,

Feiga Rakhmitlevna Timianskaya, Esfir Yakovlevna Pokhorenko and Maria Rafailovna Kemurdjian.

James W. Kynes, Jr., Attorney General, and Joseph Nesbitt, Assistant Attorney General, for State of Florida.

Wakefield & Underwood, as guardian ad litem for the Unknown Heirs and Beneficiaries of Jacob Tim, Deceased.

Before HORTON, TILLMAN PEARSON and HENDRY, JJ.

TILLMAN PEARSON, Judge.

The county judge has ordered that the property of Jacob Tim escheat to the State of Florida. This appeal is from that order and we reverse upon the holding that as against the state certain heirs have proved their relationship.

The story of Jacob Tim is an American odyssey. Its counterparts have inspired thousands to immigrate to America. He was born in Brest-Litovsk, Russia in 1872; came to America as a penniless youth of 17 and died in the Sherry Frontenac Hotel on Miami Beach, Florida. He was a very rich man.

Somewhere along the journey, he decided to travel alone. He never married. He recognized no relative and often declared that he had none. He left no will.

The order appealed was made pursuant to § 731.33,

Fla.Stat., F.S.A.[1] It sets forth the basis of the trial judge's conclusion:

> "The decedent was born in Brest-Litovsk, Russia (formerly known as Grodna, Poland) on or about August 17, 1872 under the name of Timiansky, and emigrated to this country in 1889. Decedent lived in New York City for many years thereafter and founded a business known as Tim's Cap Corporation. The business was located at 354 West 17th Street for many years and up to its dissolution and liquidation in 1933. At that time the liquidated assets were transferred to a corporation known as J. T. Corporation. The decedent was sole stockholder, director and President of the J. T. Corporation, a Delaware Corporation. All assets constituting the estate of the decedent being administered by this Court were derived from this corporation.
>
> "The respective claimants have filed herein answers to the Administrator's Petition for Determination of Heirs, alleged family trees, and profferred evidence, all of which the Court has considered and weighed in an attempt to find facts which might in some degree substantiate the claim of one or more claimants. Even with such consideration the Court finds that while a similarity of names, religion and nativity has been

---

[1]Section 731.33(1):

"Whenever any person dies leaving property without being survived by any person entitled to the same, such property shall escheat to the state."

shown by a number of claimants, this is not sufficient to establish relation by blood or affinity.

"The Court finds that on the whole the evidence submitted by each claimant or each group of claimants is insuficient to establish a relation with the decedent by blood or affinity.

"In this connection, and in passing, this Court is not unaware of the findings of the Surrogate's Court in the New York proceedings handed down on December 21, 1956; suffice it to say that the New York Surrogate himself expressed doubts as to the admissibility of the crucial evidence due to the requirements necessary to overcome the objection of the Hearsay Rule; it is evident from the Surrogate's findings that the Surrogate had to make certain inferences, assumptions and take judicial notice of factors which this Court does not believe justified or warranted under the evidence submitted; accordingly, this Court cannot arrive at the same conclusions as the Surrogate of New York.

"This Court also had the benefit of substantial evidence and testimony which was not introduced before the Surrogate in the New York proceedings, and further certain claimants offering evidence in these proceedings were not claimants in the New York proceedings.

"Considering the record in its entirety including the testimony, transcripts, depositions and evidence submitted to this Court, it is clear that

there were more than one and perhaps many unrelated Timiansky families residing in Brest-Litovsk prior to the turn of the century, and at the time the decedent resided there. There is a similarity of names, religion and nativity, but this is not sufficient evidence upon which this Court may base a determination and finding that any of the claimants are related by blood or affinity with the family of the decedent. And this is especially true in a case of this nature where the decedent came to this country as a very young man in 1889, alone and without family accompanying him, who never married as near as can be ascertained, and about whom substantial evidence does exist as to his propensity to deny being related to anyone, as to his steadfast contention expressed to those with whom he was closely associated denying the existence of any relatives or occasionally making conflicting statements as to pedigree, not helpful here.

"It is the further opinion of this Court that to determine heirship on the basis of the record and evidence presented may do irreparable injustice in this case whereas by escheat any person claiming to be entitled to the property of the decedent may, at any time within the permitted period, reopen the administration and assert and prove his rights."

Notice of appeal was filed by Fishel Rudawski, Liza Kahane, Jacob (Roden) Rudawski, Jacob Timiansky and Zorah Timiansky, who will be hereafter referred to as the "Rudawski Group." A joinder in appeal was filed by

Sophie Kovner, Sara Bernard, Anna Wachtel, Rose Hechler, Becky Fine and Mary Bernard, designated here as the "Bernatsky Group".

Another group of claimants, designated here as the "Timiansky Group", were named appellees and have filed cross-assignments of error. Other claimants named appellees have filed briefs asserting error and urging that the appellants are not the heirs and that the evidence establishes that they are the heirs of the deceased. In addition, we have had the benefit of a brief of Tohmas H. Wakefield, a member of the bar, as guardian ad litem for unknown heirs, who joined with the Attorney General of the State of Florida in urging the affirmance of the order appealed.

It is a well-settled principle that escheat is not favored by the law. Any doubt as to whether property is subject to escheat will be resolved against the state. See cases collected at 19 Am.Jur. Escheat § 14 (1939); 30 C.J.S. Escheat § 16 (1942). It has been said that " . . . [T]he party claiming must prevail by the strength of his own title not by the weakness of that of his adversary. . . . The ordinary rational as well as the legal presumption as to every person is, that he *must have some relatives and consequently some heirs*, however remote, and whether known to him or not . . . . " Univ. of N. C. v. Harrison, 90 N.C. 385 (1884).

The language of § 731.33(3) Fla.Stat., F.S.A., sets forth the determination that must be made for a finding that property escheats to the State. This subsection begins: "If the county judge determines in such proceeding that there is no person entitled to the property . . . . "

We conclude that the finding of the trial judge that the property and estate of Jacob Tim, deceased, escheats to the State of Florida is not supported by this record. There is upon the record no doubt that Jacob Tim has heirs. Indeed, the trial judge placed his decision upon the difficulty and possible injustice of determining who they are.

Having reached the decision that the record will not support a finding that the property should escheat to the State of Florida, we turn to the contentions of the parties to the appeal that the county judge erred in failing to find that they had proved heirship. Reference was made in the trial judge's order to the opinion of the Surrogate's Court, New York County, New York in this same estate. The opinion is reported at In Re Tim's Estate, 6 Misc.2d 47, 159 N.Y.S.2d 520 (Surr.Ct. 1956). It was affirmed without opinion at 8 App.Div.2d, 720, 187 N.Y.S.2d 1019 1959).

The relitigation of some of the same claims (not all the claimants before the Florida Court were parties to the New York proceeding) occurred here because of unusual circumstances. Jacob Tim died intestate in Miami Beach, Florida. Administration proceedings were instituted in both Florida and New York. A dispute as to domicile resulted in an action at law in New York between the two administrators. As a result of the litigation, a stipulation was entered into between the Florida Administrator and the New York Administrator wherein it was agreed that after the payment of certain expenses of the last illness and burial of the deceased, one-half of the decedent's estate would be administered by the Florida Administrator and the other half would be administered by the New York Administrator. This stipulation was approved by the New

York Court and by the Florida Court. By the stipulation the Florida Administrator received approximately $280,000 in cash. The question of domicile of Jacob Tim was never settled between the State of New York and the State of Florida.

The New York proceedings went to trial for a determmination of the heirs of Jacob Tim. That trial culminated in the opinion of Mr. Surrogate Collins, cited above. Thereafter, the record of the New York proceedings was admitted into evidence in the administration of the estate in Dade County, Florida. Additional testimony, depositions, and evidence were also presented.

The County Judge of Dade County found that Florida was the domicile of the decedent. This finding is not questioned on this appeal. Therefore, insofar as the Florida courts are concerned, Florida is the proper forum to determine heirship of personal property, and such determination is not bound by the law of a sister state.

The appellants (Rudawski Group) urge that the New York order is binding upon the trial court in these proceedings. We cannot agree with the above contention. A primary basic proposition of law with universal application is that upon the determination of the heirs of the deceased by a court of competent jurisdiction *in the domicile of the deceased*, such heirs take the personal tangible and intangible property of the deceased wherever its situs may be. See cases collected at 11 Am.Jur., Conflicts of Law, § 82 n. 8 (1937).

Guided by the several briefs, we have examined the evidence submitted to prove heirship.

Fishel Rudawski, Liza Kahane and Jacob (Roden) Rudawski contend that Jacob Tim, formerly known as Jacob Timiansky, was the brother of Sarah Feige Rudawski, nee Timiansky; that Sarah Feige was the mother of their father Gedalia; and therefore, they are the grandniece and grandnephews of the decedent.

Jacob and Zorah Timiansky contend that the deceased, Jacob Tim, was the brother of their father, Aron Timiansky; and therefore, they are nephews of the deceased.

As already set forth, Jacob Tim died in 1954 at the age of 82. He had formerly been engaged in the cap-manufacturing business in New York City.

Mr. Elias Israel, a disinterested witness, testified that while employed as a cap maker in New York City in 1889 or 1890, a man named Jacob Timiansky came to work in the same shop. Mr. Israel described Jacob Timiansky's physical characteristics. He also indicated that Timiansky had immigrated to this country about 1889 from Brest-Litovsk. Many years later, Mr. Israel again met, on various occasions, the same Jacob Timiansky who then called himself Jacob Tim.

Fishel, Liza and Jacob Rudawski were born in Brest-Litovsk. For the early part of their lives, they lived with their father and mother, Gedalia and Rachel Rudawski, and their paternal grandmother, Sarah Feige Rudawski, nee Timiansky.

Mrs. Dina Ginzburg, a disinterested witness, testified she had known Sarah Feige Rudawski, nee Timiansky, as a young girl. Mrs. Ginzburg stated that while visiting

Sarah Feige's home she had met Samuel Timiansky, Sarah Feige's father, and Jacob Timiansky, Sarah Feige's brother. She also had knowledge of Jacob's trip to the United States and was present at Sarah Feige's home when a letter was received from Jacob announcing his arrival in America. Mrs. Ginzburg indicated that Jacob was about 16 or 17 years old at the time of his trip to America. She also gave a description of Jacob's physical appearance which was consistent with the description given by Mr. Israel.

There was evidence to indicate that the decedent's father, Samuel Timiansky, had other children, including a son named Aron Timiansky. Mrs. Rachel Chwoinek testified that at the wedding of her sister to Aron Timiansky she was introduced to Samuel Timiansky as Aron's father.

Passport applications sworn to by Jacob Tim establish that the decedent stated under oath that he was born in Brest-Litovsk in 1872, that he immigrated to the United States from Europe in 1889; that his father's first name was "Samuel" and that he was engaged in the cap-manufacturing business in New York City. The applications give a physical description of the decedent which corroborates descriptions given by witnesses Israel and Ginzburg.

There is other evidence to support the claim of this group but we believe that the foregoing is suficient to outline the basis of the claim that Jacob Timiansky, who changed his name to Jacob Tim and who died in Miami Beach, Florida, is one and the same person as the Jacob Timiansky who was the uncle of Jacob and Zorah Timian-

sky and the granduncle of Fishel, Jacob and Liza Rudawski.

It should be noted that in the main the testimony introduced by the various groups is not conflicting. Each group attempted to establish a common ancestor. We cannot say that the evidence supporting the claims of the appellants (Rudawski Group) is exclusive of other heirs, but none of the other claimants have met the degree of proof required.

We, therefore, hold that the county judge erred when he failed to find that Fishel Rudawski, Jacob (Roden) Rudawski and Liza Kahane had established their status as grandnephews and grandniece, respectively, of Jacob Tim the deceased. Further, we hold that Jacob Timiansky and Zorah Timiansky established their status as nephews of the deceased. As to the other claimants, we affirm the finding of the county judge. Accordingly, the order appealed is reversed and the cause remanded with directions to enter an order in accordance with the views herein expressed.

Reversed and remanded.

HENDRY, Judge, (dissenting).

The order of the learned probate judge indicates to me that he made a thorough analysis of the testimony. Inasmuch as, he heard all of the witnesses, except those who testified by deposition, he was in much better position than we are to evaluate the effect of their testimony. This record, in my opinion, clearly justifies the application of the established rule that we will not interfere with the findings

of fact or conclusions of law reached by a probate judge on the basis of such findings unless there is an absence of substantial competent evidence to support the findings or the trial court misapprehended the legal effect of the evidence.

It is my view that there is adequate evidence to support the result reached by the trial judge and that there is no basis in the record for any conclusion on our part that he misinterpreted the legal effect of the evidence.

For these reasons, I am obliged to dissent from the conclusion reached by the majority. I think the judgment should be affirmed.

APPENDIX G

IN THE COUNTY JUDGES' COURT IN AND FOR DADE COUNTY, FLORIDA. IN PROBATE

[CAPTION OMITTED]

ASSIGNMENTS OF ERROR

FISHEL RUDAWSKI, LIZA KAHANE, JACOB (RODEN) RUDAWSKI, JACOB TIMIANSKY and ZORAH TIMIANSKY by their undersigned attorneys hereby assign the following errors to be asserted and relied upon by them on their appeal heretofore filed in this cause to-wit:

I.

The Court erred in entering its Final Order on Administrator's Petition to Determine Heirs and Beneficiaries and Order of Escheat bearing date the 2nd of July, 1962, entered in the above styled cause and recorded in the records of said Court in Probate Record Book 228, page 633.

II.

The Court erred in the aforesaid Final Order in finding that the record did not disclose sufficient evidence to establish relation by blood or affinity of the foregoing FISHEL RUDAWSKI, LIZA KAHANE, JACOB (RODEN) RUDAWSKI, JACOB TIMIANSKY and ZORAH TIMIANSKY with the decedent.

III.

The Court erred in finding that the evidence submitted as a whole was insufficient to establish a relationship between decedent and the aforesaid FISHEL RUDAWSKI, LIZA KAHANE, JACOB (RODEN) RUDAWSKI, JACOB TIMIANSKY and ZORAH TIMIANSKY.

IV.

The Court erred in failing to give full faith and credit to the finding of the Surrogate Court in the New York proceedings handed down December 21, 1956.

V.

The Court erred in finding that the Surrogate's opinion of December 21, 1956, was based upon certain inferences and assumptions while the record discloses that the Surrogate's opinion was predicated upon substantial material evidence presented in the New York proceedings.

VI.

The Court erred in finding that substantial evidence and testimony was introduced before the Court and not introduced before the Surrogate in the New York proceedings when the record discloses that all such evidence was not substantial, was immaterial and could not affect the findings of the New York Surrogate.

VII.

The Court erred in failing to enter an order determin-

ing that the foregoing FISHEL RUDAWSKI, LIZA KAHANE, JACOB (RODEN) RUDAWSKI, JACOB TIMIANSKY and ZORAH TIMIANSKY were related to the decedent through a common ancestor.

VIII.

The Court erred in ordering that the property of Jacob Tim, Deceased, should escheat to the State of Florida.

IX.

The Court erred in failing to hold that the aforesaid FISHEL RUDAWSKI, LIZA KAHANE, JACOB (RODEN) RUDAWSKI, JACOB TIMIANSKY and ZORAH TIMIANSKY are entitled to the property and estate of the decedent Jacob Tim.

X.

The Court erred in failing to find that the law of the case was established by the Surrogate's opinion of December 21, 1956, handed down in New York and in failing to follow the said opinion in accordance with the provisions of the Full Faith and Credit Clause of the Federal Constitution.

XI.

The Court erred in failing to preclude relitigation of questions of fact as required by the doctrine of res judicata.

DATED this ____ day of September, 1962, at Miami Beach, Florida.

MAX SILVER and
SIBLEY, GRUSMARK, GIBLIN, KING & LEVENSON
Attorneys for Fishel Rudawski, Liza Kahane, Jacob (Roden) Rudawski, Jacob Timiansky and Zorah Timiansky.

By_____
Milton E. Grusmark
Of Counsel

APPENDIX H

COUNTY JUDGES' COURT IN AND FOR DADE COUNTY, FLORIDA

[CAPTION OMITTED]

FINAL ORDER ON ADMINISTRATOR'S PETITION TO DETERMINE HEIRS AND BENEFICIARIES AND ORDER OF ESCHEAT.

(Filed July 2, 1962)

THIS CAUSE came on before the Court on the petition of David E. Ward, as Administrator of the Estate of Jacob Tim, deceased, to determine heirs and beneficiaries of the said deceased, and the various answers and claims of heirship filed in these proceedings, and upon the record of the trial of the issues before this Court on December 5 and 6, 1960, and further hearing held July 14, 1961, as well as depositions and evidence presented to this Court at trial, and briefs of counsel of record presented to this Court on October 16, 1961, and oral argument thereon before this Court on November 14, 1961.

FINDINGS OF THE COURT

This Court finds that the decedent, JACOB TIM, died on June 4, 1954 at St. Francis Hospital, Miami Beach, Florida; that on July 9, 1954, Letters of Administration were issued by this Court to David E. Ward, as Administrator; that upon proceedings in New York by the Public Administrator, Letters of Administration were issued by the New York Surrogate to the Public Administrator;

that the decedent left an estate of approximately Five Hundred Sixty-five Thousand and no/100 ($565,000.00) Dollars when the same was liquidated, which estate, after payment of certain stipulated costs, was divided evenly between the Public Administrator of New York and the Florida Administrator for administration purposes; that for purposes of this administration this Court finds JACOB TIM, the decedent, was for many years prior to his death domiciled in and a resident of the State of Florida; that in 1956 the Florida Administrator filed a petition for the determination of heirship in accordance with Florida Statutes, Section 734.25 and duly published citation thereof and served same on the Attorney General of the State of Florida in accordance with Florida Statutes, Section 731.33; that thereafter various appearances, answers and claims were filed in these proceedings on behalf of alleged heirs claiming to be nephews, nieces, grand-nieces, grand-nephews and cousins in varying degrees of the decedent, JACOB TIM.

The decedent was born in Brest-Litovsk, Russia (formerly known as Grodna, Poland) on or about August 17, 1872 under the name of Timiansky, and emigrated to this country in 1889. Decedent lived in New York City for many years thereafter and founded a business known as Tim's Cap Corporation. The business was located at 354 West 17th Street for many years and up to its dissolution and liquidation in 1933. At that time the liquidated assets were transferred to a corporation known as J. T. Corporation. The decedent was sole stockholder, director and President of the J. T. Corporation, a Delaware corporation. All assets constituting the estate of the decedent being administered by this Court were derived from this corporation.

The respective claimants have filed herein answers to the Administrator's Petition for Determination of Heirs, alleged family trees, and proffered evidence, all of which the Court has considered and weighed in an attempt to find facts which might in some degree substantiate the claim of one or more claimants. Even with such consideration the Court finds that while a similarity of names, religion and nativity has been shown by a number of claimants, this is not sufficient to establish relation by blood or affinity.

The Court finds that on the whole the evidence submitted by each claimant or each group of claimants is insufficient to establish a relation with the decedent by blood or affinity.

In this connection, and in passing, this Court is not unaware of the findings of the Surrogate's Court in the New York proceedings handed down on December 21, 1956; suffice it to say that the New York Surrogate himself expressed doubts as to the admissability of the crucial evidence due to the requirements necessary to overcome the objection of the Hearsay Rule; it is evident from the Surrogate's findings that the Surrogate had to make certain inferences, assumptions and take judicial notice of factors which this Court does not believe justified or warranted under the evidence submitted; accordingly, this Court cannot arrive at the same conclusions as the Surrogate of New York.

This Court also had the benefit of substantial evidence and testimony which was not introduced before the Surrogate in the New York proceedings, and further certain claimants offering evidence in these proceedings were not claimants in the New York proceedings.

Considering the record in its entirety including the testimony, transcripts, depositions and evidence submitted to this Court, it is clear that there were more than one and perhaps many unrelated Timiansky families residing in Brest-Litovsk prior to the turn of the century, and at the time the decedent resided there. There is a similarity of names, religion and nativity, but this is not sufficient evidence upon which this Court may base a determination and finding that any of the claimants are related by blood or affinity with the family of the decedent. And this is especially true in a case of this nature where the decedent came to this country as a very young man in 1889, alone and without family accompanying him, who never married as near as can be ascertained, and about whom substantial evidence does exist as to his propensity to deny being related to anyone, as to his steadfast contention expressed to those with whom he was closely associated denying the existence of any relatives or occasionally making conflicting statements as to pedigree, not helpful here.

It is the further opinion of this Court that to determine heirship on the basis of the record and evidence presented may do irreparable injustice in this case whereas by escheat any person claiming to be entitled to the property of the decedent may, at any time within the permitted period, re-open the administration and assert and prove his rights.

CONCLUSION

It is the conclusion of this Court after due consideration of the record in these proceedings that no claimant herein has shown by sufficient and credible evidence a relationship with the decedent through a common an-

cestor, and the Court being fully advised in the premises, it is

ORDERED

1. All objections made during trial proceedings to the admissibility of evidence and testimony which were at that time reserved by this Court for future decision, are hereby overruled.

2. That no claimant and no person in these proceedings claiming as an heir or beneficiary is entitled to the property and estate of the decedent, JACOB TIM.

3. That the property and estate of JACOB TIM, deceased, escheats to the State of Florida in accordance with Section 731.33, Florida Statutes.

4. This Court hereby retains jurisdiction for the purpose of determining compensation, allowances and costs of these proceedings.

DONE and ORDERED at the Dade County Court House, Miami, Florida, this 2d day of July, 1962.

s/ W. F. Blanton
W. F. BLANTON, COUNTY JUDGE

APPENDIX I

COUNTY JUDGES' COURT IN AND FOR
DADE COUNTY, FLORIDA

[CAPTION OMITTED]

PETITION FOR DETERMINATION OF HEIRS AND BENEFICIARIES

TO: Hon. W. F. Blanton, County Judge:

Comes now DAVID ELMER WARD by his undersigned attorney, and respectfully shows:

1. That he is the duly qualified and acting Administrator of the Estate of Jacob Tim, deceased, who died on June 4, 1954 at Miami Beach, Dade County, Florida, a resident of Miami Beach, Dade County, Florida. That he is in doubt as to the distribution of said estate, and as to the various heirs, if any, and what they should receive.

2. Petitioner has made diligent search and inquiry to ascertain the persons having an interest in said estate, and so far as is known to him, the said Jacob Tim died without heirs.

Petitioner, therefore, desires that this Court determine the heirs, if any, and the beneficiaries of said estate.

WHEREFORE, Petitioner prays that citation be issued and published as required by law, and that this Hon-

orable Court determine the names and interests of the beneficiaries, if any, of said estate.

(Signatures of Administrator and
Attorney and acknowledgment omitted)

APPENDIX J

[CAPTION OMITTED]

OPINION

(Entered by Mr. Surrogate Collins of the New York Surrogate's Court on December 21, 1956)

"Estate of Jacob Tim — Jacob Tim died intestate in Miami, Florida on June 4, 1954, leaving an estate situated both in Florida and in this state. A curator of his estate was appointed in Dade County, Florida, while this court issued letters of administration to the public administrator of New York County. A conflict resulted as to the domicile of the decedent and the administration of his estate. It was settled by agreement which has been approved in both jurisdictions.

"On February 9, 1956, the public administrator filed his account and requested a direction that the balance of the assets in his possession be paid into the city treasury upon the ground that the distributees of the decedent were unknown. Numerous objections have been filed by persons claiming kinship to the decedent. Among others, they include two separate groups of objectants, each of whom claimed the same degree of relationship to the decedent; nieces, nephews, grandnieces and grandnephews—through two unrelated families bearing the same name.

"The decedent was born in Brest-Litovsk (formerly Poland, now within the territory of U.S.S.R.) in 1872, and emigrated to this country in or about 1889. He was then

about seventeen years of age. There was some proof that a number of years after his arrival in this Country he changed his name from "Timiansky" to "Tim." In passport applications, he gave his father's name as Samuel Tim. None of these applications reveals the name of his mother. However, information on a signature card of the decedent in an account with a savings bank shows the name of his mother to be "Rebecca." Decedent was engaged in the cap business in New York City until some time in 1933.

"For convenience, the two contending groups of objectants under consideration will be referred to as the Poses group and the Rudawski-Timiansky group. The Poses group asserts that decedent's mother was named Feige Timiansky who left Brest-Litovsk in or about 1910 for Palestine, where she died several years later. The members of the Poses group were unable to furnish the name of the father, who is claimed to have died many years earlier. They claim that the decedent had one brother and three sisters. The Rudawski-Timiansky group names the defendant's father as Schmuel or Samuel Timiansky, who died some time after 1910. The name of Decedent's mother, who was said to have died many years earlier, was unknown to them. They, on the other hand, assert that decedent had three brothers and one sister.

"Obviously these two sets of objectants were describing two separate families in Brest-Litovsk, who bore the same family name.

"As in all cases involving pedigree and the distribution of intestate property, there must first be established the identity of the common ancestor. Until such identification is made, no family tree can be traced, and no ju-

dicial determination of pedigree can be made. It is known from decedent's passport applications that his father's name was Samuel. While the applications describe the father's name as Samuel Tim, it appears from the testimony of a disinterested witness that the family name was Timiansky, and that it was changed by the decedent to Tim some years after his arrival in this country. Decedent was of the Jewish faith, and it appears that in the Jewish settlement of Brest-Litovsk the name Timiansky was not uncommon.

"Most of the evidence upon which the objectants rely is in the form of oral pedigree hearsay declarations. Such declarations concerning pedigree are admissible as an exception to the hearsay rule provided (1) the declarant is dead (2) the declaration was made ante litem motam, and (3) the declarant was related either by blood or affinity to the family concerning which he speaks (Young v. Shulenberg, 165 N.Y. 385; Aalholm v. People, &c., 211 N.Y. 406; Matter of Morris, 277 App. Div., 211; Matter of Whalen, 146 Misc., 176; Matter of Wendel, 146 Misc., 260; Matter of Wood, 164 Misc., 425; Matter of Hayden, 176 Misc., 1078).

"Before the declarations can be received, the relationship of the declarant to the family of the decedent must first be established by independent proof, although slight proof is sufficient (Aalholm v. People, &c., supra, pp. 413, 419; Matter of Morris, supra, pp. 213, 215; Matter of Wendel, supra, pp. 265, 266).

"**The Poses Objectants.** As noted above, these objectants were unable to name the father of the decedent. Their starting point in the family tree is Feige Timiansky

who resided in Brest-Litovsk until 1910, when she left for Palestine. Feige had five children— Lana, Schrulke or Israel, Miriam, Yankel or Jacob (claimed to be the decedent), and Liebe, Mrs. Vera Poses, a daughter of Lana and a granddaughter of Feige Timiansky, testified that her parents spoke frequently of Yankel Timiansky (the alleged decedent) having left his family in Brest-Litovsk to avoid military service. As a young child, she knew her grandmother Feige intimately. She knew all of her grandmother's children, with the exception of Yankel Timiansky, who was no longer in Brest-Litovsk in the early 1890's. Mrs. Poses testified further that when she came to this country, she was told by one of her sisters, who had preceded her here and who has since died, that in 1910 she had visited Jacob Tim, at which time she received from him two knitted caps for her boys. In the conversation with her deceased sister, Jacob Tim was referred to as "Uncle Jack."

"Mrs. Rifke Buls, a niece of Feige Timiansky, testified that she was told by her aunt that her aunt's son, Yankel, had stolen money from her grocery store and had disappeared; that Feige's son, Schrulke, had spoken of having written to a relative in the United States to have him ask his rich brother, Yankel, for money; that in 1922 Schrulke, who was then living with her in Poland, asked a visiting relative from this country what had happened to his brother, Yankel, and was told by this relative that he had gotten money from him for "Brisker Relief"; and that at family gatherings attended by her Aunt Feige, mention was made of Jacob Timiansky who was in the United States.

"Jacob Tim, an alleged nephew of decedent and one of the objectants herein, testified that two years before his departure from Brest-Litovsk (about 1907) his father, Schrulke Timiansky, spoke of his brother as a wealthy manufacturer in New York.

"There was also testimony by and on behalf of the Poses objectants quoting deceased members of the family as having referred to Jacob Tim (the alleged decedent), as their wealthy uncle, and having mentioned the fact that he made caps for Young boys.

"The admissibility of these hearsay declarations depends upon the existence of independent evidence connecting the declarants with the family of the decedent. These objectants contend that the documentary proof of the decedent's place of birth, the date of his departure from Brest-Litovsk, his occupation as a cap manufacturer, and the location of his business, coincide with the testimony which they and their witnesses gave at the trial. They maintain that a son of Feige Timiansky, named Yankel, or Jacob, had left Brest-Litovsk sometime prior to the early 1890's, that he was visited by members of their Timiansky family in New York at his place of business where he manufactured caps, and that several members of the family, after emigrating to this country, shortened their name to Tim. Finally, they argue that there is a strong resemblance between the photographs of the decedent and one of the granddaughters of Feige Timiansky.

"While the required independent evidence connecting the declarants with the decedent's family need only be "slight," yet it must be of a nature which permits formation of a rational judgment (Matter of Hayden, supra, p.

1080). It must be such that unaided by the pedigree declarations it furnishes independent evidence of the claimed relationship of the declarants to the family of the decedent.

"The identity of names, religion and nativity are too common to be alone sufficient evidence of family connections" (Aalholm v. People, &c., supra, p. 419; Matter of Whalen, supra, p. 190). This rule has peculiar application to this case where it appears that the family name, Timiansky, was quite common in the Jewish settlement of Brest-Litovsk. According to one of the witnesses, there were many families in Brest-Litovsk who bore the name Timiansky.

"The Poses case rests upon the claim that Feige Timiansky has a son named Yankel or Jacob, who left Brest-Litovsk as a young man at a time which coincides with the date of decedent's departure from Brest-Litovsk.

"It is significant that in the early family conversations there was no reference to her son's occupation or to his precise whereabouts. It is possible that it was not until members of the family came to this country that it became known that Jacob Tim was engaged in the cap manufacturing business in New York City and that, seizing upon the similarity of names, they concluded that the decedent was their missing relative. Here again, apart from the hearsay declarations, decedent's occupation and the locations of his business are not proof that he was a member of their family.

"Thus, disregarding the identity of names, religion and nativity, there was no independent evidence which connects the declarants with the family of the decedent.

The fact that a member of descendants of Feige Timiansky who resided in New York visited or attempted unsuccessfully to visit the decedent at his place of business is without sufficient probative significance. The similarity of names may well have led them to suppose that decedent was their relative. They lived in the same city as did the decedent for many years, and it would normally be expected that during this long period of time there would be some acknowledgment from the decedent of his kinship to them. There is no evidence of such acknowledgment. It is suggested by some testimony that when decedent left Brest-Litovsk he was aggrieved at certain members of his family. It is also suggested that it is not uncommon for a wealthy person to shun his poor relatives. But all of this is sheer speculation.

"The fact that he was visited by one or more of his claimed relatives and that he persistently refused to see others is not inconsistent with a belief that they were not related to him. Absent therefore any acknowledgment by decedent of the claimed relationship, these visits are without significance.

"The fact that some members of the Timiansky family, upon emigrating to this country, shortened their name to Tim, is also without significance. It is not an uncommon practice among immigrants who come to this country with long names to shorten them. Nor do the photographs in evidence furnish any independent proof that the declarants were connected by blood or affinity to the decedent's family. Evidence of facial or physical resemblance is valueless, for experience has demonstrated that such evidence is neither accurate nor reliable (Matter of Wendel, 146 Misc., 260). As Judge Foley stated in the Wendel case

"what is taken as resemblance by one is not perceived by another with equal knowledge of the parties between whom the resemblance is supposed to exist." There can be no honest dissent from this view. In any event, I have inspected the photographs and perceive in them no resemblance to each other, contrary to the opinion expressed by the attorney for the Poses objectants that there is a striking resemblance between the two.

"The hearsay declarations adverted to above do not have sufficient probative value to establish the claimed kinship to the decedent.

"While the Poses objectants and their witnesses profess a fairly comprehensive knowledge of the names of the various members of the Timiansky family stemming from Feige Timiansky, they all disclaim knowledge of the name of Feige's husband, who is said to have died some time prior to the early 1890's. Mrs. Poses and Mrs. Buls were on intimate terms with their relative, Feige Timiansky. There were gatherings of the family attended by Feige at which matters of interest to the family were discussed. Common experiences would suggest that on some occasion Feige would speak of her deceased husband who had fathered five children. Yet, according to the witnesses, his name was never mentioned. However, not only do the Poses witnesses reveal a lack of knowledge or information as to decedent's father's name, but their testimony as to decedent's mother's name is at variance with the documentary evidence. The documentary evidence shows that the decedent's mother's name was "Rebecca" and not "Feige" as claimed by them. The signature card of the decedent in an account opened by him on February 2, 1932, with the Emigrant Industrial Savings Bank, re-

ceived in evidence, which contains the name "Samuel" as the father of decedent, "Brest-Litovsk" as the decedent's place of birth, and "Rebecca" as the mother of decedent, must be deemed credible evidence particularly since the father's name and the decedent's place of birth correspond with the known facts.

"Since there is no independent evidence connecting the declarant with the family of the decedent, the pedigree declarations are without effect.

"Upon this state of the record, no reasonable conclusion can be drawn that the decedent was a member of the Timiansky family described by the Poses objectants. Their objections to the account are overruled and their claims dismissed.

"**The Rudawski-Timiansky Objectants.**—This group consists of Fishel Rudawski and his sister Liza Kahane, both residents of Israel, and their brother Jacob Roden, who resides in Italy. It includes also Jacob and Zorah Timiansky, both of whom reside in Israel. The testimony by and on behalf of these objectants taken in Israel upon an open commission was received in evidence at the trial. Certain exhibits were offered in evidence, and they will be discussed later. The testimony discloses that objectants Fishel Rudawski, Liza Kahane and Jacob Roden are the children of Gedalia Rudawski and the grandchildren of Sarah Feige Rudawski (nee Timiansky). Their grandmother was the daughter of Samuel Timiansky who died some time after 1910. Samuel Timiansky also had four sons, Yerschmiel, Abraham, Aron and Jacob, who is claimed to be the decedent. The objectants, Zorah and Jacob Timiansky, are the sons of Aron Timiansky, and

the grandsons of Samuel Timiansky. It appears that Samuel Timiansky was married more than once. The Rudawski-Timiansky objectants were unable to state the name of the mother of each of Samuel's five children.

"One Dina Ginzburg testified on behalf of these objectants. She stated that she was about eighty years of age when testifying in August, 1955. She therefore must have been born about the year 1875. She testified that when she was about fourteen years old, she frequently visited her friend, Sheina, at the home of Sheina's mother, Sarah Feige Rudawski. On a few of these visits, she met Sarah Feige's father, who was named Schmuel (Samuel). On some of these visits, she also met a brother of Sarah Feige named Jacob who was then about sixteen or seventeen years of age. She overheard Jacob complain to his sister of being mistreated by their stepmother. She also heard them speak of Jacob's plans for leaving for America.

"Mrs. Ginzburg testified further that after Jacob's departure, his sister Sarah Feige grieved but later was happy when she received a letter from him. This witness was subjected to an extensive cross-examination and in the main, the essentials of her testimony were unshaken. She was the only witness who claims to have been Sarah Feige Rudawski's brother Jacob in Brest-Litovsk, and her description of his height and complexion was not at variance with the known facts.

"Mrs. Ginzburg's testimony is sufficient to furnish some connecting link between the decedent and the family of Sarah Feige Rudawski by proof independent of the hearsay declarations. (Matter of Morris, 277 App. Div.,

211) The date of the pending departure of Sarah Feige's brother Jacob from Brest-Litovsk, as given by Mrs. Ginzburg, coincides with the known fact that decedent left that city in or about 1889. The age of Sarah Feige's brother Jacob at that time also coincides with the fact that decedent was then about seventeen years of age. The name Schmuel, which is the Yiddish equivalent of Samuel, was given by Mrs. Ginzburg as the name of the father of Sarah Feige. This coincides with the fact that the name of the decedent's father was Samuel. These coincidences go beyond identify of name, nativity and religion. They furnish a rational basis for the conclusion that the young man described by Mrs. Ginzburg and the decedent were one and the same person.

"There remains the question whether the Rudawski-Timiansky objectants have established their membership in the Timiansky family of the decedent.

"The testimony of Fishel Rudawski so far as pertinent may be summarized as follows: He was born in Brest-Litovsk in 1919. His parents were Gedalia and Rachel Rudawski. He had three brothers and one sister. The brothers were named Shlomo, Motel and Jacob. His sister's name was Liza. He, Liza and Jacob are the objectants herein.

"Fishel's grandmother, Sarah Feige Rudawski, lived with them. He heard his grandmother speak of her brothers Yerachmiel Timiansky, Abraham Timianski, Yacob Timiansky and Aron Timiansky. He heard his grandmother speak of her brother Yacov having left for America when he was very young. He recalled his grand-

mother receiving letters from America and was told they came from her brother.

"Fishel learned from his parents that the name of Sarah Feige's father was Schmuel. He had occasion to enter the name in the family register which was required to be kept in order to record the goings and comings of residents who remained away from their home for at least three days. He remembered having entered the departure and arrival of Sarah Feige Rudawski upon an occasion when she visited a relative in another city. He entered her name and the first name of her father.

"Sarah Feige's three brothers who remained in Poland each owned some real property in Brest-Litovsk. During the absence of her brother, Abraham Timiansky, his nephew Gedalia Rudawski (Fishel's father) managed his real property. Fishel saw a sign on the house which read "The House of Timiansky. The Heir Rudawski." There were time when Fishel collected rents on behalf of his father. After the death of Abraham, one of Abraham's daughters, named Filla, visited the Rudawskis.

"Fishel also recalled that in 1918 or 1919 four or five children of Aron Timiansky visited his home. There was offered in evidence a number of documents which established parentage of Fishel and his place of birth. Fishel left for Israel in 1930. He was followed two years later by his sister Liza. In 1935, his mother and younger brother Jacob (Roden) arrived in Israel. The mother died in 1954. Jacob Roden lives in Italy. Fishel's brothers Shlomo and Motel remained in Poland and were not heard from after 1939.

"Liza Kahane, the sister of Fishel, corroborated much of her brother's testimony. In connection with her testimony, there was offered into evidence a number of exhibits which included a certificate issued to her father, Gedalia Rudawski, at the end of World War I, which apparently was necessary to enable him to return from Russia to Brest-Litovsk. There was a reference in this exhibit to his uncle "A. Timiansky." The exhibits which were marked for identification included also a letter dated April 20, 1937, from Motel Rudawski, an envelope postmarked Brest-Litovsk April 23, 1937, and addressed to his mother, Rachel, in Israel, and a slip of paper said to have been enclosed with the letter in the envelope. The slip of paper has writings on it in latin characters "Tims Corp. 17 St-54 W N.Y." There is also a notation on it in Yiddish "the address of your uncle in New York which Filla gave." Liza testified that these papers were found among the personal effects of her mother who had died in the year before. Expert testimony concerning the authenticity of these exhibits affirms the probability that they were written in 1937. The court has inspected the papers and finds no sufficient basis for declaring them forgeries. They have the appearance of age. The many crease lines in the paper may have been the result of deliberate crumpling in order to simulate age as one of the experts suggested. They may also be explained by much handling over a long period of time.

"Liza testified that her mother received the letter which was written in Yiddish and that she, Liza, recognized the handwriting as that of her brother. Liza's ability to recall in 1955, receipt of a particular letter by her mother eighteen years earlier may be questioned in view of her interest in the proceeding. But since the papers

which appear to be authentic were found among the mother's effects they will be received into evidence along with the other exhibits mentioned above. As indicated above, nothing was heard from Motel who remained in Poland after 1939, although previously thereto he had corresponded with his mother. The extermination of the Jews of Brest-Litovsk by the Nazis was described by one of the witnesses. Judicial notice may be taken of the mass execution of Jews in Poland and other parts of Europe which came under Nazi domination. It is reasonable to conclude from the fact that Motel was known to be in Poland prior to 1940, and has not been heard from since that he has perished along with the other Jews (cf. Matter of Frankel, 196 Misc., 268).

"The letter from Motel refers to the address on the slip of paper of uncle Jacob. The address on the slip of paper was the business address of the decedent in New York at least up to 1933. While the decedent was no longer at that address in 1937 the papers do provide some proof linking the Rudawskis to the decedent.

"The pedigree testimony of Fishel and Liza was corroborated in varying detail by a number of witnesses.

"Mrs. Rachel Chwoinik, a sister-in-law of Aron Timiansky, testified that she was present at Aron's marriage to her sister in 1910. At that time Aron was about twenty-nine years of age. Aron's father, Samuel, and his second wife, who was Aron's mother, attended the wedding. The wedding was also attended by Aron's brother Abraham Timiansky, who then appeared to be about forty-two years of age. Aron is reported to have said to the witness that he had another brother who lived in America, and a sister.

The witness was shown a photograph taken at the wedding, and among those identified was Aron Timiansky, the bridegroom.

"Dr. Bulkowstein, another witness, testified that as a young child he had been a close friend of the Rudawski children and visited at their home where he saw Sarah Feige Rudawski. He quoted Sarah Feige as having mentioned that she had a brother Yankel (Jacob) in the United States. Sarah Feige knew that the witness was a stamp collector and on a number of occasions gave him American stamps. He stated that Sarah Feige died when he was about nine years of age. He further testified that he had met Filla Timiansky, the daughter of Abraham Timiansky, a number of times. He had seen the real property belonging to Abraham Timiansky with the inscription thereon, "House of Abraham Timiansky, the Heir Gedalia Rudawski."

"Aron Timiansky, the son of Samuel, was the father of Jacob and Zorah Timiansky, both objectants herein, and both witnesses in Israel. Jacob Timiansky identified his parents in the wedding photograph mentioned above. He testified that he was born in Brest-Litovsk in 1913, and that his father died five years later. Zorah was born in 1917, and for a while after his father's death, he lived with his aunt, Rachel Chwoinik. Mrs. Chwoinik had testified to like effect.

"It appears that Samuel Timiansky (decedent's father) was married at least twice, and that he had children by both wives. It is not entirely clear which of the children were born of the first marriage and which of the second. When young Jacob, the decedent, left Brest-

Litovsk in or about 1889, he spoke of his stepmother who must have been Samuel's second wife.

"It is clear that there were at least two unrelated Timiansky families in Brest-Litovsk. There is no evidence that decedent acknowledged his relationship to either of these families. Nevertheless, the letter with the enclosure sent from Poland in 1937 identified the decedent with the Rudawski family. It is supported by the independent proof elicited from Mrs. Ginzburg, the aged and apparently disinterested witness.

"From all of the evidence and the reasonable inferences to be drawn therefrom, the court concludes that the objectants, Fishel Rudawski, Jacob Roden and Liza Kahane have established their status as grandnephews and grandniece, respectively, of the decedent, and that the objectants Jacob and Zorah Timiansky have established their status as nephews of the decedent. Further proof will be necessary to determine whether they are the sole distributees.

"The claims of all other persons who have filed objections as alleged distributees other than the Rudawski-Timiansky objectants are dismissed.

"Submit decree on notice settling the account accordingly."

APPENDIX K

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

[CAPTION OMITTED]

STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that the above entitled action be settled upon the following terms and conditions:

1. In pursuance of an agreed plan to fully and completely liquidate the defendant J. T. Corporation the estate of Jacob Tim, deceased, shall by virtue of the fact that said Jacob Tim at the time of his death was the sole owner of all of the issued stock of said J. T. Corporation be deemed to be the owner of all of the assets and property of whatsoever nature of said Corporation.

2. Plaintiff, The Chase National Bank of the City of New York, is hereby authorized and directed to transfer all of the moneys which it now holds in the custody account of J. T. Corporation to an account in the name of the estate of Jacob Tim, deceased, subject to the order of the Court in the above entitled action.

3. The plaintiff, The Chase National Bank, is hereby also authorized and directed to transfer all other moneys on deposit with it in the account of J. T. Corporation to said account in the name of the estate of Jacob Tim, deceased, the total amount of the deposits being approximately $565,469.21.

4. Any moneys belonging to the late Jacob Tim which have come into the possession of defendant Arthur J. McQuade as the New York administrator of the estate of Jacob Tim, deceased, and any other assets of Jacob Tim, deceased, shall be deposited by both administrators in said account in the name of the estate of Jacob Tim, deceased, with the plaintiff.

5. All of the moneys transferred by the plaintiff, The Chase National Bank, and by the defendant Arthur J. McQuade as said administrator to the account of Jacob Tim, deceased, shall be held by said plaintiff pursuant to the orders of this Court dated August 13 and December 13, 1954, as fully and with the same force and effect and to the same extent as if said moneys in the account in the name of the estate of Jacob Tim, deceased, constituted the property held by the plaintiff pursuant to the said orders of the Court and shall be subject to the jurisdiction of this Court.

6. All of the moneys so transferred by the plaintiff, The Cahse National Bank, and by the defendant Arthur J. McQuade as said administrator to the account in the name of the estate of Jacob Tim, deceased, shall be paid out only upon checks or written stipulations bearing the signatures of both defendant Arthur J. McQuade, Acting public Administrator of the County of New York, as the New York administrator of the estate of Jacob Tim, deceased, and defendant David Elmer Ward as the Florida administrator of the estate of Jacob Tim, deceased, together with an order of the Court in this action.

7. The moneys to the credit of the account with The Chase National Bank in the name of the estate of Jacob

Tim, deceased, and any and all other assets of Jacob Tim, deceased, and J. T. Corporation shall be divided equally and distributed and paid in equal shares to the defendant Arthur J. McQuade, Acting Public Administrator of the County of New York, as the New York administrator of the estate of Jacob Tim, deceased, and the defendant David Elmer Ward as the Florida administrator of the estate of Jacob Tim, deceased. The administrators agree that within a reasonable time they shall pay in equal shares the following debts and charges of or against the estate of Jacob Tim, deceased, and said J. T. Corporation:

(a) Any and all reasonable bills for medical surgical, hospital and nursing care and for medicine supplied to the late Jacob Tim;

(b) Any and all reasonable expenses connected with the funeral and burial of said Jacob Tim;

(c) All federal income taxes owing by J. T. Corporation, together with interest and penalties thereon, if any;

(d) Federal estate tax on the estate of Jacob Tim, deceased. Each administrator shall retain as a reserve against possible additional tax liability the sum of $35,000, said reserve to be retained until such time as final clearance is obtained from the Internal Revenue Service.

(e) All Federal income taxes owing by the late Jacob Tim, together with interest and penalties thereon, if any;

(f) The filing fee due to the State of Delaware on said J. T. Corporation;

(g) Any indebtedness owing to the Sherry-Frontenac Hotel at Miami Beach, Florida;

(h) Any other indebtedness owing by the late Jacob Tim and J. T. Corporation, including but not limited to taxes.

(i) All traveling and hotel expenses of Isadore Gomberg amounting to approximately $1,500 for four trips to Florida, in connection with the making of funeral arrangements and burial of the remains of said Jacob Tim and in taking charge of the affairs and property of said Jacob Tim;

(j) The sum of $36 advanced by Isadore Gomberg to pay the franchise tax and representation fee in Delaware for the year ending January 31, 1954;

(k) The reasonable fees of Messrs. Milbank, Tweed, Hope & Hadley, attorneys for the plaintiff herein, for legal services rendered herein;

(l) The disbursements of the plaintiff in this action other than for legal services;

(m) Any custodial fees due the plaintiff.

8. Out of the one-half share of the remaining moneys payable to the defendant David Elmer Ward as the Florida administrator of the estate of Jacob Tim, deceased, David

Elmer Ward agrees that the sum of $15,000 shall be paid to Messrs. Newman, Hauser & Teitler for legal services rendered by them to said defendant, as such Florida administrator and to the defendant J. T. Corporation as represented by David Elmer Ward, William A. Underhill and Doyle E. Carlton.

9. The defendant Arthur J. McQuade as such New York administrator and the defendant David Elmer Ward as such Florida administrator shall each bear his own expenses of administration without regard to the amount thereof and without right of reimbursement or compensation from the other.

10. The defendant Arthur J. McQuade as the New York administrator of the estate of Jacob Tim, deceased, shall be solely responsible for the payment and shall pay any and all inheritance, transfer, estate and succession taxes and any other taxes whatsoever which may be due or owing to the State of New York from or which may be imposed upon the estate of Jacob Tim, deceased, by the State of New York; and said Arthur J. McQuade shall hold the defendant David Elmer Ward as administrator of the estate of Jacob Tim, deceased, free and harmless from any liability whatsoever for any such taxes.

11. The defendant David Elmer Ward as the Florida administrator of the estate of Jacob Tim, deceased, shall be solely responsible for the payment and shall pay any and all inheritance, transfer, estate and succession taxes and any other taxes whatsoever which may be due or owing to the State of Florida from or which may be imposed upon the estate of Jacob Tim, deceased, by the State of Florida; and said David Elmer Ward shall hold

the defendant Arthur J. McQuade as New York administrator of the estate of Jacob Tim, deceased, free and harmless from any liability whatsoever for any such taxes.

12. If for any reason (and regardless of who the parties at fault may be) the settlement herein provided for shall not be consummated, none of the parties hereto shall have or assert any right or claim any advantage from any act done pursuant to any of the provisions of this stipulation, but all of the rights of the parties shall be and remain the same as if this stipulation had not been entered into and the moneys in the account of J. T. Corporation and of Jacob Tim had not been transferred to an account in the name of the estate of Jacob Tim, deceased; and all rights and claims of all of the parties hereto shall be strictly limited to the rights and claims possessed by them at the time of the commencement of this action.

13. This agreement is entered into between the parties subject to the approval of the Surrogate's Court, New York County, New York, and the County Judges Court of Dade County, Florida, and the parties agree that they will institute the necessary proceedings to obtain said approval with reasonable dispatch.

14. Upon the consummation of the settlement hereinbefore provided for the parties hereto shall cause their respective attorneys to enter into and deliver to the plaintiff, said The Chase National Bank, a stipulation discontinuing this action without costs to any of the parties and discharging said plaintiff from any and all liability to any of the parties to this action.

Dated New York, N. Y., January 28, 1955.

/s/ Arthur J. McQuade
Arthur J. McQuade, Acting Public Administrator of the County of New York, as Administrator of the Estate of Jacob Tim, Deceased.

s/ David Elmer Ward,
David Elmer Ward As Administrator of the Estate of Jacob Tim, Deceased

J. T. CORPORATION
by
s/ Arthur J. McQuade,
Arthur J. McQuade,
President and Treasurer

J. T. CORPORATION
by s/ David Elmer Ward
David Elmer Ward
President

s/ Joseph T. Arenson
Joseph T. Arenson
Attorney for Defendants, Public Administrator of the County of New York, as Administrator of the Estate of Jacob Tim, Deceased, and J. T. Corporation (as represented by Arthur J. McQuade and Nathan Levy)

s/ Newman, Hauser & Teitler
Newman, Hauser & Teitler,
Attorneys for Defendants, David Elmer Ward as Administrator of the Estate of Jacob Tim, Deceased, and J. T. Corporation (as represented by David Elmer Ward, Wm. A. Underhill and Doyle E. Carlton)

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IN THE

SUPREME COURT OF THE UNITED STATES

January Term, 1966

No. 1165

FISHEL RUDAWSKI, LIZA KAHANE, JACOB (RODAN) RUDAWSKI, JACOB TIMIANSKY and ZORAH TIMIANSKY,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

MOTION TO BE NAMED AS RESPONDENT AND FOR CORRECTION OF CAPTION, AND FOR LEAVE TO FILE BRIEF IN OPPOSITION AS ATTACHED

THOMAS H. WAKEFIELD,
as Guardian ad Litem for Unknown Heirs of Jacob Tim, Deceased,
211 Rosedale Building,
150 S. E. 2nd Street,
Miami, Florida

IN THE

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January Term, 1966

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Thomas H. Wakefield as Guardian ad Litem for Unknown Heirs of Jacob Tim Deceased, by virtue of appointment by the County Judge in Probate, Dade County, Florida and as an attorney admitted to practice before this Court, respectfully represents that movant was a petitioning party to the Supreme Court of Florida, which

Court issued the decision sought to be reviewed by the petitioners herein, was served with a copy of the petition filed herein and is a necessary party to these proceedings.

Undersigned moves to be made a party respondent in the above styled cause, for the caption herein to be corrected to include movant therein and for leave to file a brief in opposition to the petition, which brief accompanies this motion.

Thomas H. Wakefield

THOMAS H. WAKEFIELD,
as Guardian ad Litem for Unknown Heirs of Jacob Tim, Deceased,
211 Rosedale Building,
150 S. E. 2nd Street,
Miami, Florida

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JANUARY TERM, 1966

NO. 1165

FISHEL RUDAWSKI, LIZA KAHANE, JACOB (RODAN) RUDAWSKI, JACOB TIMIANSKY and ZORAH TIMIANSKY,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

EARL FAIRCLOTH
Attorney General

SAM SPECTOR
Assistant Attorney General
Attorneys for State of Florida,
Respondent
The Capitol
Tallahassee, Florida

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IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1966

NO. 1165

FISHEL RUDAWSKI, LIZA KAHANE, JACOB (RODAN) RUDAWSKI, JACOB TIMIANSKY and ZORAH TIMIANSKY,

Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

STATEMENT OF THE CASE

Jacob Tim, the decedent, died intestate on June 4, 1954, domiciled in and a long time resident of the State of Florida. Decedent's property consisted of intangible personalty and was physically located within the State of New York.

On July 9, 1954, domiciliary proceedings were commenced in Dade County, Florida, and an administrator was duly appointed pursuant to such proceedings.

The assets of the decedent, being substantial in amount and being located in the State of New York, a public administrator was appointed by the New York Surrogate.

Thereafter, on January 28, 1955, in a case pending before the Supreme Court of the State of New York, County of New York, a stipulation was entered into by the public administrator of New York, the New York administrator, the Florida administrator, and the J. T. Corporation. This stipulation was approved by said Court and had the effect of dividing the estate between the States of New York and Florida for administration purposes. (Petitioners' Appendix K)

Thereafter, another stipulation was entered into by both administrators, dated June 30, 1955, which said later stipulation was approved by both the Florida Probate Court and the New York Surrogate's Court. (Respondent's Appendix A, Page 1) By the terms of said stipulations, the assets of the decedent were divided and separate, and independent administration of such assets was agreed to.

Thereafter, proceedings to determine heirs and beneficiaries were held as to the divided assets in the respective states. The controlling statute in the Florida proceedings was Section 734.25, Florida Statutes. (Respondent's Appendix B, Page 8)

The Florida Probate Court found that none of the claimants before it, including petitioners in this cause, had established themselves as heirs who were entitled to decedent's estate. (Petitioners' Appendix H, Page 41)

In a parallel proceeding in the State of New York, the New York Surrogate, during the course of administration of the assets agreed to by the stipulations aforesaid to be administered in that State, held that the herein petitioners were heirs and thus entitled to take. (Petitioners' Appendix J, Page 48)

The New York order was dated December 21, 1956, while the Florida order was dated July 2, 1962.

The principal thrust of the petition herein is that the Florida courts should have given full faith and credit under the Federal Constitution to the earlier New York order holding that petitioners were heirs of the decedent. This contention is made in total disregard of the fact that the New York Court was not the court of the decedent's domicile; that the parties before the New York Court and the evidence submitted in the New York proceedings differed from the parties and evidence before the Florida Court; and, lastly, that the stipulations to which these petitioners were a party provided for separate and independent administrations of the decedent's divided assets.

JURISDICTION

United States Supreme Court Rule 19(1)(a) provides for review on writ of certiorari ". . . only where there are special and important reasons therefor." Matters indicated by said rule which will be considered by this Court are that a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

Petitioners have not demonstrated the existence of special and important reasons for the review being sought. The petition does not reflect that the State court has decided a federal question of substance nor has it been shown that the State court's decision was ". . . probably not in accord with applicable decisions of this court."

QUESTION PRESENTED

WHERE THE PROBATE COURTS OF TWO STATES BY STIPULATION AND AGREEMENT THEREFOR TAKE JURISDICTION OF A DECEDENT'S ASSETS FOR PURPOSES OF ADMINISTRATION AND THEREUPON ENTER FINAL ORDERS PURSUANT TO SEPARATE AND INDEPENDENT TRIALS ON THE MERITS, ARE SUCH FINAL ORDERS JUDGMENTS COMING WITHIN THE PURVIEW OF THE FULL FAITH

AND CREDIT CLAUSE AND THUS REQUIRED TO BE FOLLOWED BY THE COURT WHICH ENTERS ITS FINAL ORDER LAST IN POINT OF TIME?

REASONS FOR DENYING WRIT

This Court has held:

1. That judgments relating to the descent and distribution of property do not come within the purview of the Full Faith and Credit Clause of the Federal Constitution. *Olmsted v. Olmsted*, 216 U. S. 386. In so ruling, the Court at page 395 stated:

> ". . . We hold that there is nothing in the Federal Constitution requiring the courts of the State of New York to give force and effect to the statute of the state of Michigan so as to control the devolution of title to lands in New York."

The petition does not reflect that the Full Faith and Credit Clause of the Federal Constitution is applicable to the facts of this case. Not only is it the law that the administration of decedents' estates are solely within the jurisdiction of the domiciliary state, but the petition crassly ignores that the stipulations entered into by the petitioners contemplated separate and distinct administrations in Florida and New York of the decedent's divided assets. In its very essence, the petition asks this Court to regard the stipulations calling for separate and distinct administrations to be but the starting signal for

a "judicial foot race" between the New York and Florida courts in determining heirship to the decedent. The lack of soundness of such a result becomes readily apparent if the Court considers whether had the Florida order holding that the decedent had no heirs been entered first in point of time, then and in that event would the petitioners concede or urge that the New York Court, being hypothetically last in point of time, would then be bound by the Florida court's finding of no heirs.

2. The record reflects that Florida was the unquestioned domicile of the decedent. The Florida court held:

> ". . . Jacob Tim, the decedent, was for many years prior to his death domiciled in and a resident of the State of Florida. . . ." (Petitioners' Appendix H, Page 41)

The stipulations herein make it abundantly clear that it was the intent of the parties that the separate res placed in the possession of each of the administrators would be administered separately.

The Florida courts properly made the determination of heirship and distribution pursuant to Section 734.25, Florida Statutes. The Florida court action of independently making this determination is consistent with the principle adhered to by this Court in Wilkins v. Ellett, 9 Wall U. S. 740; 19 L. Ed. 586, in which the Court stated the following:

> "It has long been settled, and is a principle of universal jurisprudence in all civilized nations that the

> personal estate of the deceased is to be regarded, for purposes of succession and distribution, wherever situated, as having no other locality than that of his domicile; and if he dies intestate the succession is governed by the law of the place where he was domiciled at the time of his decease, and not by the conflicting laws of the various places where the property happened at the time to be situated. Citing 2 Kent Com. 429; Story, Conflict of Laws, Sec. 379."

3. It is manifest that the New York Court was governed by the laws and procedures of that State in deciding the question of heirship. The Florida Court in making its determination of the same issue was likewise governed by the law and procedure of the State of Florida. Different standards of law and procedure being applicable, it follows that the Full Faith and Credit Clause did not and could not apply.

4. The second ground upon which the petitioners seek review is that of deprivation of due process arising from the Florida Court's ruling on the issue of burden of proof. The Florida Supreme Court construing a Florida statute, Section 731.33, Florida Statutes, declared the law of the State of Florida respecting the proof required before the estate of a decedent may be escheated to the State. In so ruling the Court held (Petitioners' Appendix A, Page 4):

> "The burden of proving the existence of the state of facts upon which the statutory right to inherit depends should be upon the one asserting such statu-

tory right." Citing 20 Am. Jur., Evidence, Section 135, Page 140, and In re Miller's Estate, 87 Wash. 69, 151 Pac. 105, from which the Court quoted extensively.

The question decided by the Florida Supreme Court was a question of Florida law. That it was decided adversely to petitioners does not reflect deprivation of property without due process under law. Due process under law has never been known to guarantee that a litigant will prevail in an action. The statute which the Florida Supreme Court was called upon to construe was enacted by the Florida Legislature and the Florida Court is the sole authority to determine the meaning and application of the statute.

> "The laws of the several states, except where the constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply." (28 USCA, Section 1652)

The record at every level of the Florida judicial process reflects that every consideration and opportunity has been accorded the petitioners to establish their relationships to the decedent. The voluminous evidence presented to and considered by the trial judge on behalf of fifty-three claimants and the full and thorough investigation of the facts by court officers reflect diligence on the part of the Florida courts in arriving at the decision sought to be reviewed.

5. Petitioners' contention that the Florida Supreme Court acted arbitrarily and capriciously by misconstruing the opinions of the lower court is without basis. The reasons for denial of the writ hereinabove stated adequately demonstrate the absence of arbitrary and capricious action by the Florida Court.

CONCLUSION

For the reasons above stated, it is urged that the granting of the writ should be denied. Petitioners have failed to show that the decision in question involves importance to the public or that a genuine constitutional question is presented as required by United States Supreme Court Rule 19.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

SAM SPECTOR
Assistant Attorney General
Attorneys for State of Florida,
Respondent
The Capitol
Tallahassee, Florida

APPENDIX

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APPENDIX A

SURROGATE'S COURT: COUNTY OF NEW YORK

In the Matter of the Application of the Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of

JACOB TIM,

Deceased,

To compromise and settle an action.

Subject to the approval of the following stipulation by the Surrogate of the County of New York and to the entry of an order of the County Judge's Court in and for Dade County, Florida, as set forth in paragraph "7" hereof, the undersigned hereby stipulate and agree that the application herein of the respondents, JACOB TIMIANSKY, ZORAH TIMIANSKY, LIZA KAHANE and FISHEL RUDAWSKI (hereinafter referred to as Respondents) for the issuance of a commission to take oral testimony in Israel of the persons named in paragraph 1 of respondents' notice of motion dated May 20, 1955, to wit: JACOB TIMIANSKY, ZORAH TIMIANSKY, LIZA KAHANE, FISHEL RUDAWSKI, DYNA GINSBURG, RACHEL CHWOINIK, DR. JONAS BULKOWSTEIN, A. LEVINSON, SIMHA FNINY, MOSHE CHMILEVSKI and AARON STAWSKY, and of such other persons as may be located in Israel by any of the parties (prior to the completion of the examination of the persons named in

said notice of motion) who may be able to give testimony relevant to the status of said respondents as distributees of JACOB TIM, deceased, be granted upon the following terms and conditions:

1. The taking of said depositions in Israel shall commence on the 29th day of August, 1955, unless an earlier date shall be agreed upon by the persons participating in the taking of said despositions.

2. Except as the parties may otherwise agree, all depositions shall be taken at the Hotel Dan, in Tel-Aviv, Israel.

3. The following persons shall participate in the taking of the depositions:

A. An attorney for the Public Administrator of the County of New York;

B. The Florida attorney for DAVID ELMER WARD, Administrator in the State of Florida of the Estate of JACOB TIM, deceased;

C. The New York attorney for DAVID ELMER WARD, the Florida Administrator of the Estate of JACOB TIM, deceased;

D. An attorney representing the respondents in the proceedings in the Surrogate's Court in the County of New York;

E. An attorney representing the respondents in the estate proceedings in the County Judge's Court in and for Dade County, Florida;

F. The Special Guardian for unknown distributees appointed by the Surrogate of New York County;

G. The Commissioner appointed by the Surrogate of New York County.

4. That the examination of such of the witnesses as do not speak the English language be conducted through an interpreter qualified to act as such in judicial proceedings in the courts of the State of Israel or through an interpreter agreed upon by the attorneys participating in the taking of the depositions.

5. The testimony of each witness shall be transcribed as soon after the taking thereof as possible, and a copy thereof given to each of the attorneys for the respective parties, and upon the completion of the transcript of the testimony of the last witness the respective transcripts shall be submitted to the witness for signing. At any time prior to the signing of the deposition by a witness any party shall have the right to recall such witness for the purpose of clarifying any testimony theretofore given by the witness or for the purpose of testifying regarding matters testified to by other witnesses after the initial examination of the witness in question. Any witness so recalled shall also be subject to further cross-examination.

5-a. The witnesses examined shall answer questions regardless of objections raised by any of the parties, it being understood that all objections made to questions asked, except as to form, and all motions made to strike answers shall be deemed reserved for ruling at the hearing or trial, if any, wherein the deposition of the witness may be used, in New York or Florida, as the case may be.

5-b. The parties hereto agree that in the event that any party shall for any reason, except as hereinafter provided, fail to appear at the taking of the depositions, the depositions may be taken without such party with the same force and effect as if such party were present and had examined and cross-examined the witnesses, provided that if any party shall be unable to reach Tel-Aviv by the 29th day of August, 1955 due to failure of pre-arranged transportation which but for such failure would have resulted in the party's timely presence in Tel-Aviv, then upon notice of such failure of transportation cabled to the Hotel Dan in Tel-Aviv, the taking of the depositions shall be postponed until the arrival of the delayed participants, but such delay shall in no event exceed three days.

6. Subject only to the Court's rulings on objections raised to questions and on motions to strike answers, any party hereto shall have the right to read into evidence the testimony of the witnesses or any of them taken as aforesaid in any action or proceeding in the State of New York and the State of Florida involving the distribution of the estate of JACOB TIM or in which the status of

the respondents as distributees may be in issue; with the same force and effect as if the witnesses testified in person at the trial of such action or proceeding.

7. Upon (1) the approval of this stipulation by the County Judges' Court in and for Dade County, Florida and the Surrogate of the County of New York, and (2) upon the entry of an order of the County Judge's Court in and for Dade County, Florida, directing the taking (for use in the Florida courts) of the said depositions on the terms and conditions herein provided, the stipulation dated January 28, 1955 settling, subject to the approval of said Courts, the action brought in the Supreme Court, County of New York, by the CHASE NATIONAL BANK OF THE CITY OF NEW YORK (now the CHASE MANHATTAN BANK), as plaintiff, against ARTHUR J. McQUADE, as Administrator of the Estate of JACOB TIM, DAVID ELMER WARD as Administrator of the Estate of JACOB TIM, in the State of Florida, and J. T. CORPORATION, as defendants, shall be deemed approved and consented to in its entirety by the parties; and the answer of the respondents to the Public Administrator's petition verified the 29th day of April, 1955, as well as the objections of the respondents to the Florida Administrator's petition to the County Judge's Court in and for Dade County, Florida, shall be deemed withdrawn.

Upon the approval thereafter of said stipulation dated January 28, 1955 by the County Judge's Court in and for Dade County, Florida, and the Surrogate of the County of New York, this stipulation shall immediately become binding on all the parties hereto.

7-a. It is expressly understood and agreed that unless both the Surrogate of the County of New York and the said County Judge's Court make orders directing the taking of the depositions on the terms herein stated and approving this stipulation and the said stipulation dated January 28, 1955 this stipulation shall be of no force and effect.

8. The expenses connected with the taking of the despositions shall be borne equally by the New York and Florida funds:

Upon the approval of this stipulation by the said Surrogate, the entry of the order referred to in paragraph 7 hereof, and the approval of said Surrogate and of said County Judge's Court of the stipulation dated January 28, 1955 hereinabove mentioned, there shall be withdrawn from the account of the estate of JACOB TIM in the CHASE MANHATTAN BANK by the joint check of the Public Administrator of New York County and the Florida Administrator the sum of $14,000, which sum shall be deposited in a joint bank acount to the credit of the Public Administrator of New York County and the Florida Administrator, the funds of which shall be payable on the joint signatures of ARTHUR J. McQUADE, Public Administrator of New York County, or JOSEPH T. ARENSON, his attorney, and DAVID ELMER WARD, the Florida Administrator, or DOYLE E. CARLTON, his attorney. From the said amount there shall be paid out to each of the aforementioned persons participating in the taking of the depositions in advance of their departure for Israel the sum of $1,600.00 for traveling expenses and

expenses of stay in Israel for the purpose of taking of the depositions. Out of the balance remaining after these payments there shall be paid the expenses incident to the execution of the commission, i.e., stenographers' fees for transcription of the testimony, travel expenses of the stenographer not to exceed $750, interpreter's fees, and the expense, if any, of a room where the depositions shall be taken. If after the payment of all these expenses there should remain an unexpended balance of the said $14,000.00, one-half of said balance shall be added to the assets of the estate administered by the Florida administrator and one-half to the assets administered by the Public Administrator of New York County.

9. The assets in the hands of the Florida Administrator shall not be liable for any fees or allowances to any of the New York attorneys or said Special Guardian participating in the taking of the depositions, and the assets in the hands of the Public Administrator of New York County shall not be liable for any fees or allowances to the Florida attorneys participating in the taking of the depositions.

9-a. The fees of the attorney representing DAVID ELMER WARD, Florida Administrator, in the proceedings in the Surrogate's Court, County of New York, for their services in attending and participating in the taking of the aforesaid depositions shall be $250 per day, but not exceeding in all a total of ten days, including the number of days required in traveling to and from Israel, and said fees shall be paid out of the assets in the hands of the Florida Administrator.

10. The consent to this stipulation in the Florida proceedings by the Public Administrator of New York County and any other party hereto shall not, by virtue thereof, be deemed to be a general appearance or submission generally to the jurisdiction of the Florida courts, but it is expressly agreed that the same shall be a special and limited appearance for the purposes only of obtaining approval of the said stipulation of January 28, 1955 and the issuance and execution of the aforesaid commission; and the consent, if any, to this stipulation in the New York proceeding by the Florida Administrator and any other party hereto shall not, by virtue thereof, be deemed to be a general appearance or submission generally to the jurisdiction of the New York courts, but it is expressly agreed that the same shall be a limited and special appearance for the purposes only of obtaining approval of the said stipulation of January 28, 1955 and the issuance and execution of the aforesaid commission.

11. A duplicate original copy of this stipulation shall be filed in the instant proceeding, as well as in the Florida proceeding for approval thereof and of the aforesaid stipulation of January 28, 1955.

Dated: New York, June 30, 1955.

JOSEPH T. ARENSON
/s/ Joseph T. Arenson
Attorney for Acting Public Administrator of New York County, as Administrator of the Estate of Jacob Tim, deceased.

/s/ Newman, Hauser & Teitler, New York attorneys for David Elmer Ward, Florida Administrator of the Estate of Jacob Tim, deceased.

LAZARUS JOSEPH

/s/ Lazarus Joseph, Special Guardian for Unknown Distributees.

/s/ Mae T. Korn by Thomas Field, Attorney for Respondents Jacob Timiansky, Zorah Timiansky, Liza Kahane and Fishel Rudawski.

"No objection"

JACOB K. JAVITS /s/ JKB Jacob K. Javits, Attorney General of the State of New York.

APPENDIX B

734.25 Determination of beneficiaries.—

(1) Whenever property passes by the laws of descent and distribution or under a will to a person not sufficiently indentified in such will, and the personal representative is in doubt as to who is entitled to receive said property, or any part thereof, or if he is in doubt as to shares and amounts which any person is entitled to receive, such personal representative may file with the county judge of the court out of which his letters were issued, his sworn petition setting forth the names, residences and post-office addresses, so far as known or ascertainable by diligent search and inquiry, of all persons in interest, except creditors of the decedent or the estate, and the nature and character of their respective interests and claims so far as known, designating those who are believed by him to be minors or non compos mentis, and stating whether those so designated are under legal guardianship in this state. If the personal representative believes that there are or may be persons who have claims against or interest in such estate as next of kin, distributees, legatees or beneficiaries whose names are not known to him, the petition shall so state.

(2) Upon the filing of such petition, the county judge shall appoint a guardian or guardians ad litem if necessary and shall issue a citation to all claimants and persons in interest whose names are set forth in said petition.

(3) If said petition sets forth that there are or may be persons whose names are not known who have claims against or interests in such estate, citation shall be published, directed to all persons claiming any beneficial interest in the estate of such decedent. Such publication of citation may also include all persons whose names are known and set forth in said petition but who cannot be personally served.

(4) After a hearing upon such petition and defenses thereto and upon such testimony and evidence as may be produced before the court, the county judge shall make and enter an order finding and adjudging who are entitled to such property and the shares and amounts which they, respectively, are entitled to receive. Any personal representative who makes distribution or takes any other action pursuant to such an order shall be fully protected thereby.

(5) Whenever it is necessary to determine who are or were the heirs, legatees or devisees of a deceased person, on the petition of any interested party or like proceedings, the county judge may make a determination thereof, irrespective of whether the estate of such deceased person is administered, or if administered, whether the administration of the estate has been closed or the personal representative discharged.

History.—§182, ch. 16103, 1933; CGL 1936 Supp. 5541(134); am. §4, ch. 22783, 1945.